

# LOWER BURMA RULINGS

BEING THE

PRINTED JUDGMENTS

OF THE

CHIEF COURT OF LOWER BURMA

VOLUME IV

1907-1908

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## LOWER BURMA RULINGS.

Before Mr. Justice Irwin, C.S.I.

BABU CHIMANBUX BHOWSINGHA v. SURJU BANNIAH.

Connell, Lentaingne and N. N. Burjorjee—for applicant (plaintiff).  
Agabeg—for respondent (defendant).

Debt, Part payment of, by authorized agent—Endorsement—Limitation Act,  
1877, s. 20.

Civil Revision No. 63 of  
1906.

January 3rd,  
1907.

Although the person, other than the debtor, making part payment of a debt, must be duly authorized by the debtor to pay, in order that section 20, Limitation Act, may apply, the law does not require that he should be specially authorized to make the endorsement showing the fact of payment, or that the endorsement should be made within any particular time.

*Venkatasubbu v. Appusundran*, (1893) I.L.R. 17 Mad., 92, referred to.

The petitioner sued the respondent on two promissory notes, and claimed exemption from limitation under section 20 of the Limitation Act by reason of payments made by Jagdat Tewary as defendant's agent in August and November 1903 and January 1904, and appearing in the handwriting of Jagdat Tewary on the backs of the notes. Defendant pleaded that he never authorized Jagdat Tewary to make either payments or endorsements. At the hearing defendant said he had paid the notes in 1901, and his last witness, who was a former manager of the estate now administered by the plaintiff, said that he was shown the notes in January 1906, and there were no endorsements on them then. The learned Judge rejected the defendant's evidence, but found that the endorsements were not made until the present year, and inferred that they were made fraudulently to manufacture evidence, and were not authorized by the defendant.

The substantial ground on which plaintiff applies for revision is that he had no opportunity of meeting the allegation of fraud, which was sprung on him at the end of the trial, defendant not having pleaded that the endorsements were not made at the time when they purport to have been made.

The plea that the payments and endorsements were both unauthorized was, in my opinion, sufficient notice to the plaintiff that he should adduce the best possible evidence of both payments and endorsements. If Jagdat was not authorized to make them, why should he make them at all? The plaintiff proved the payments, and the learned Judge seems to have held that he also proved that the endorsements were in Jagdat's handwriting, but he found that they were not authorized because not made until at least two years after the payments.

While I think that the petition does not disclose any sufficient grounds for interfering with the decree, it seems to me that the learned Judge has overlooked one point. The proviso to section 20 of the Limitation Act makes no mention of the endorsements being authorized by the debtor. The payments must be authorized by the debtor, but so long as the payer is authorized to pay he requires no special authority to endorse. Neither does the proviso specify the time at which the endorsement should be made,—*Venkatasubbu v. Appusundran* (1). The learned Judge found that the payments were made by

(1) (1893) I.L.R. 17 Mad., 92.



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BABU  
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BANNIAH.

Jagdat Tewary at defendant's request, and that the endorsements recording those payments are in the handwriting of Jagdat Tewary. The requirements of section 20 therefore seem to be complete.

It was not argued for defendant that plaintiff's action in trying to prove that the endorsements were made long before they really were made can deprive him of the benefit of section 20, and if it had been, I think the contention could not be allowed. The findings are that both parties tried to deceive the Court. On the simple ground that the deception practised by the plaintiff was unnecessary, and that it was immaterial whether Jagdat made the endorsements at the same time as the payments or later, and immaterial whether he was authorized to make the endorsements or not, so long as he was authorized to make, and did make, the payments, I set aside the decree of the Small Cause Court, and I direct that defendant do pay to plaintiff Rs. 838 5-3, but there will be no order for costs in either Court.

### Full Bench (Civil Reference.)

*Before the Hon'ble Mr. C.E. Fox, Chief Judge, Mr. Justice Bigge,  
and Mr. Justice Hartnoll.*

Civil  
Reference  
No. 11  
of 1906.

December 6th,  
1906.

In the matter of a reference made by the Financial Commissioner, Burma, under section 57, sub-section (1), of the Indian Stamp Act, 1899, as amended by the Lower Burma Courts Act, 1900, Schedule I.

*Young, Assistant Government Advocate, and Higinbotham.*

*Stamp duty on trust deed for securing mortgage debentures—Mortgage deed—  
Indian Stamp Act, 1899, s. 2 (17).*

A document described as a "Trust Deed for securing Mortgage Debentures" was presented for adjudication under section 31, Indian Stamp Act, and the question of the stamp duty due was referred for decision to the Chief Court by the Chief Controlling Revenue authority. The document was admittedly executed for the purpose of securing money to be advanced by way of loan, but it was argued on behalf of the executants that it could not be regarded as a mortgage deed as it did not itself purport to transfer to and vest in the trustees any interest in the properties specified in it. The trustees were, however, given the right to have the properties vested in them to be held by them as trustees for the debenture-holders and as security for the amount to be advanced on the debentures. They were also given the rights of entry taking possession and management that mortgages and trustees for debenture-holders are usually given.

*Held*,—that as the document created rights over the property specified in it in favour of the trustees, it was a mortgage-deed under the definition contained in section 2, clause (17), Indian Stamp Act.

*Queen-Empress v. Debendra Krishna Mitter*, (1900) I.L.R. 27 Cal., 587; *The United Realization Co., Ltd. v. The Commissioners of Inland Revenue*, (1899) I.Q.B.D., 361, referred to.

The following question has been referred by the Chief Controlling Revenue authority under the provisions of section 57, sub-section (1), of the Indian Stamp Act, 1899, for decision by this Court :—

"Is the instrument attached to this order chargeable, in addition to any stamp duty leviable upon it as an instrument of any other description specified in the Schedule I to the Stamp Act, as a Mortgage-deed under Article 40?"

*Fox, C.J.*—The document is endorsed as a "Trust-deed for securing £60,000 First Mortgage Debentures with interest at 5 per cent. per annum." It is headed as an indenture between a limited Company and two gentlemen called "the Trustees." It recites that the Company had determined to issue 600 First Mortgage Debentures of £100 each framed in accordance with the form in that behalf set forth in the First Schedule and to secure such Debentures in manner appearing thereafter in the document.

By the 2nd clause the Company covenants to forthwith execute and do, or cause to be executed and done, all such assurances and things as the trustees may require for effectually vesting the freehold and leasehold hereditaments specified or referred to in the Second Schedule, and, by way of floating security, all the mills, buildings, machinery and plant of the Company, present and future, in connection therewith, in the trustees in accordance with the local laws relating thereto; and it is expressly declared that the trustees shall have an absolute and uncontrolled discretion as to what they shall require the Company to do under this clause.

The 3rd clause provides that the premises to be vested in the trustees, afterwards called the mortgaged premises, shall be held by the trustees upon trust that they shall permit the Company and its assigns to hold and enjoy these premises and do carry on therein and therewith the business or any of the business authorized by the Memorandum of Association of the Company until the security *hereby constituted* becomes enforceable, and then upon trust that the trustees may, in their discretion and upon certain events happening, enter upon and take possession of the mortgaged premises and may thereafter sell and convert the same into money.

The 4th clause opens: "The security *hereby constituted* shall become enforceable in each and every of the events following." Then follow the events.

By the 13th clause the trustees are given power to concur in leasing and in exchanging any part of the mortgaged premises at any time before the security *hereby constituted* becomes enforceable.

By the 14th clause the trustees may at any time after the security *hereby constituted* becomes enforceable apply to the Court for an order that the trusts hereof be carried into execution under the direction of the Court, and for the appointment of a Receiver or a Receiver and Manager of the premises.

By the 17th clause the trustees may themselves by writing appoint a Receiver of the mortgaged premises.

By the 18th clause the Company binds itself to execute and do all such further assurances and things as the trustees may require after the security *hereby constituted* has become enforceable.

By the 19th clause the Company irrevocably appoints the trustees to be the attorneys of the Company and in the name and on behalf of the Company to execute and do any assurance and thing which the Company ought to execute and do under the covenants contained in the deed.

By the 21st clause trustees and such person or persons as they shall from time to time in writing for that purpose appoint are given the right to enter upon the premises and at their discretion to repair the same.

By the 22nd clause the company binds itself to pay all the expenses of the trustees in relation to the execution of the trusts *during the continuance of this security*.

The other provisions of the deed need not be referred to.

The First Schedule gives the form of debenture to be issued, and says: "This debenture is issued subject to and with the benefit of the conditions endorsed hereon which are to be deemed part of it."

The 14th condition states that the holders of the debentures are and will be entitled *pari passu* to the benefit of, but subject to, the provisions contained in an Indenture dated the            day of

1906 and made between the Company of the one part and the trustees of the other part, whereby all the landed property situated at Rangoon, Bassein, Akyab and Moulmein belonging to the Company, and by way of floating security, all the buildings, mills, machinery and plant of the company, present and future, in connection therewith were covenanted to be vested in trustees for securing the payment of the principal monies, bonus and interest, payable in respect of the debentures.

The document was signed by one trustee at Bremen on the 23rd July 1906 in the presence of one witness, the British Vice-Consul. It was subsequently signed in London by the other trustee and by two Directors and the Secretary of the Company, again in the presence of one witness only.

It has been argued, on behalf of the executants of the deed that it cannot be regarded as a mortgage-deed, firstly, because it does not itself purport to transfer to and vest in the trustees any interest in the properties, and, secondly, because even if it did so, it is invalid as a mortgage under the provisions of the Transfer of Property Act, 1882.

If the matter had to be decided according to the provisions of that Act these propositions would be correct.

The First paragraph of section 58 of the Act is as follows :—

A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

And the first paragraph of section 59 of the Act runs thus :—

Where the principal money secured is one hundred rupees or upwards, a mortgage can only be effected by a registered instrument signed by the mortgagee and attested by at least two witnesses.

It need not be considered whether the document would fall within the provisions of section 100 of the Act as being a charge.

The question under reference must be decided according to the provisions of the Indian Stamp Act, 1899, alone.—See *Queen-Empress v. Debendra Krishna Mitler* (1).

Sub-clause (17) of section 2 of the Indian Stamp Act is as follows :—

Mortgage-deed includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to or in favour of, another, a right over or in respect of specified property.

There can be no question that the deed was executed for the purpose of securing money to be advanced by way of loan; and the only question is whether the document creates a right over the property specified in it in favour of the trustees. The terms of the document themselves answer this plainly. The trustees are given the right to have the properties vested in them to be held by them as trustees for the debenture-holders and as security for the amount to be advanced on the debentures. They are given the usual rights of entry, taking possession and management, which mortgagees and trustees for debenture-holders are usually given.

It has been urged that the document bears the stamp of the Commissioners of Inland Revenue in England, certifying that the document had been adjudged duly stamped with a ten-shilling stamp, and that therefore the Commissioners could not have considered that it was a mortgage within the meaning of section 86 of the English Stamp Act, 1891.

We have no means of ascertaining the grounds on which the Commissioners held the document to be duly stamped, or how they differentiated it from the document which was the subject of decision in *The United Realization Co., Ltd. v. The Commissioners of Inland Revenue* (2).

As I said before, we must decide the question according to the provisions of the Indian Stamp Act, and according to those provisions the document could only be duly stamped when it is stamped with a stamp according to the duty specified in Article 40 of the First Schedule of that Act. I would accordingly answer the question referred in the affirmative.

*Bigge, J.*—I concur.

*Hartnoll, J.*—I concur.

*Before Mr Justice Hartnoll.*

KING-EMPEROR v. H. MANUEL AND GURKIYAH.

*McDonnell*, Assistant Government Advocate.

*J.R. Vakharia*—for 1st accused.

*Reply, Prosecutor's right of—Document put in evidence by defence during cross-examination of prosecution witness—Evidence adduced by accused—Criminal Procedure Code, ss. 289, 292.*

In a sessions trial before the Chief Court, a copy of a newspaper was handed for reference to one of the prosecution witnesses during cross-examination by the counsel for the defence, and was thereupon admitted in evidence.

*Held*,—that the prosecutor was entitled to reply under section 292, Criminal Procedure Code.

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No. 31 (II)  
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*Queen-Empress v. Venkatapathi*, (1888) I.L.R. 11 Mad., 339; *Queen-Empress v. Hayfield*, (1892) I.L.R. 14 All., 212; *Queen-Empress v. Moss*, (1893) I.L.R. 16 All., 88; followed.

*King-Emperor v. Stewart*, (1904) I.L.R. 31 Cal., 1050, referred to.

In this case the two accused were being retried at the Sessions, under section 308, Code of Criminal Procedure, on two charges of extortion under section 384, Indian Penal Code. At the first trial the Judge has disagreed with the majority of the jury and had discharged them under section 305, Code of Criminal Procedure. In both trials Mr. McDonnell, Assistant Government Advocate, appeared for the prosecution, and Mr. Vakharia for the defence.

At the first trial one of the witnesses, Assistant Surgeon O'Donoghue, had made certain statements disagreeing with those of other witnesses. During the retrial Dr. Kelsall was questioned concerning some remarks made to him after the first trial by O'Donoghue, and stated that the latter told him he had seen in the newspaper that the Judge in his charge to the jury had commented on the discrepancies between his evidence and that of the other witnesses. During his cross-examination the newspaper report of the first trial was again referred to, and a copy of the newspaper containing it was handed to Dr. Kelsall, who, after reading it, stated that the remarks on the discrepancies were made not by the Judge, but by the Assistant Government Advocate and by Mr. Vakharia. The Assistant Government Advocate then pointed out that the newspaper, having been produced by the defence, should be numbered and brought on to the record as an exhibit in the case, and this was accordingly done.

At the conclusion of the case for the prosecution, Mr. Vakharia when asked under section 289, Code of Criminal Procedure, stated that he meant to adduce no evidence. The Assistant Government Advocate then claimed the right of reply under section 292, Code of Criminal Procedure, inasmuch as the defence had adduced evidence by putting in the newspaper as an exhibit.

*Mr. Vakharia*, for the accused.—I submit that the prosecution is not entitled to reply because I put in as an exhibit, during the cross-examination of one of the prosecution witnesses, a newspaper report of the previous Sessions trial. Dr. Kelsall referred to this report in his cross-examination, and I had therefore to question him upon it. Under section 289, Criminal Procedure Code, an accused cannot adduce evidence, and cannot even be asked to do so, until the examination of the prosecution witnesses and his own examination are concluded. It follows that an accused cannot be said to have adduced evidence because he has put in a document during the cross-examination of one of the prosecution witnesses. Section 292, read with section 289 of the Criminal Procedure Code, shows that the prosecution is entitled to reply only in cases where the accused calls a witness or puts in a document after he has been called upon to adduce evidence.

*The Assistant Government Advocate (Mr. T. F. R. McDonnell)*, for the Crown.—The language of section 292 of the present Code of Criminal Procedure must be considered with that of section 292 of Act X of 1882 and that of section 252 of Act X of 1872. Section 252 of the Code of 1872 says:—"If any evidence is adduced on behalf of

the accused person, the officer conducting the prosecution shall be entitled to reply." This section is preceded by section 251, which says:—"When the examination of the witnesses for the prosecution and the examination of the accused person is concluded, the accused person shall be asked whether he means to call witnesses. If he says that he does not, the prosecutor may sum up his case."

By Act X of 1882 a slight modification of the language was made. Section 289 runs thus:—"The accused shall be asked whether he means to adduce evidence." The language is therefore wider than that of section 251 of the 1872 Code. The words "whether he means to adduce evidence" may mean whether he means to call witnesses or adduce documentary evidence. Section 292 of the Code of 1882 says:—"If the accused, or any one of the accused, has stated, when asked under section 289, that he means to adduce evidence, the prosecutor shall be entitled to reply." That is, if the accused, on being asked, says that he does not mean to adduce evidence, the prosecutor must sum up his case.

The present Code in section 292 says:—"If the accused, or any of the accused, adduces any evidence, the prosecutor shall be entitled to reply." Now the question is whether under the present law, if in the course of cross-examination any document is put in, including the witness's deposition in the Magistrate's Court, and if in answer to a question put to him under section 289, the accused says he does not mean to adduce evidence, the prosecution is entitled to reply on account of the document put in before the case came to the stage contemplated in section 289.

Under the Act of 1872 there is not a single case of the Calcutta or Bombay High Courts in which the prosecution was given the right to reply on account of the defence putting in documents during cross-examination.

The Madras and Allahabad High Courts have construed the words to include documents put in in cross-examination. This view follows the English Law (28 and 29 Vic., C. 18, s. 2, and 61 and 62 Vic., C. 36, s. 3) that if any witness other than the accused is called for the defence, or if any document is put in evidence for the defence at any time in the course of the trial, the prosecution has the right to reply.

In the cases of *Queen-Empress v. Venkatapathi* (1), *Queen-Empress v. Hayfield* (2) and *Queen-Empress v. Moss* (3), it was decided that the putting in of documentary evidence by the accused gave the Crown the right of reply. These cases were all decided under the Code of 1882. The case of *King-Emperor v. Robert Stewart* (4), although it was there decided that in the particular circumstances of the case there was no right of reply on the part of the Crown, also clearly supports my contention on the present Code.

*Hartnoll, J.*—The weight of authority seems to show that under the new Code the prosecutor has the right of reply in this case, and I rule accordingly.

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(1) (1888) I.L.R. 11 Mad., 339.  
(2) (1892) I.L.R. 14 All., 212.

(3) (1893) I.L.R. 16 All., 88.  
(4) (1904) I.L.R. 31 Cal., 1050.

Criminal  
Appeal  
No. 716 of  
1906.

December  
20th,  
1906.

Before Mr. Justice Hartnoll.

KING-EMPEROR v. KANAPPA CHETTY AND N. A. S. O.  
SOMASUNDRUM CHETTY.

*Lentaigne*—for appellant.

*J. R. Das*—for respondents.

*Pawnbroker—Taking in pawn—Indian Contract Act, Chapter IX.*

The law relating to pawning and pawnbrokers in this country is to be found in Chapter IX of the Indian Contract Act. Under the provisions of this chapter the receipt of goods as security for a loan constitutes a 'taking in pawn,' even though no fixed time be agreed on for the repayment of the loan.

A person cannot be held to be a pawnbroker unless it is proved that he habitually carries on the business of lending money on the security of goods pledged with him, and that he holds himself out to lend money on such security.

Kanappa Chetty and N. A. S. O. Somasundaram Chetty were prosecuted by the Municipal Committee of Rangoon in that they took in pawn a pair of pearl *nagats* and a gold ring set with a spinel, advancing thereon Rs. 20 and Rs. 10 respectively and charging interest at the rate of four annas per mensem per ten rupees, not being licensed pawnbrokers and in contravention of bye-law 2 of the bye-laws under section 142 (e) of the Burma Municipal Act framed by the Rangoon Municipal Committee, and in that they thereby committed an offence punishable under section 180 (1) of the Burma Municipal Act. They were acquitted, and against this order of acquittal an appeal has been laid by the Local Government.

The facts proved are not in dispute. They are that two municipal *thugyis*, Maung Shwe Thi and Maung Po Lon, were sent by a Municipal official to obtain small loans from the Chetty firm on pledging articles for the money thus obtained. The two men went together to the room of the second accused, where the first accused was at the time. They obtained their money from the hands of the first accused, who is the clerk of the second accused and who acted under the direction of the second accused. Maung Shwe Thi gave a pair of *nagats* and obtained a loan of Rs. 20, while Maung Po Lon gave a gold ring and obtained a loan of Rs. 10. The articles were given as security for the due payment of the loans. The Chetty took an "on demand" note from Maung Shwe Thi for his loan; but no such note was taken from Maung Po Lon. The rate of interest was four annas per Rs. 10 per mensem. No time was fixed within which the articles were to be redeemed and interest was taken beforehand for any period out of the amount advanced on the said articles. In defence Somasundrum Chetty said:—

"It is true that I advanced the two municipal *thugyis* the sums of Rs. 20 and 10 respectively and received from them the articles mentioned. I did not, however, do so as a pawnbroker. The two *thugyis* came to me and asked me to lend them some money, and I could not do so without some security; and it was as security that I kept the articles. From the *thugyi* who took Rs. 20 I also took an 'on demand' note; but from the man who took Rs. 10 I did not take an 'on demand' note, as we do not take such a receipt for loans of less than Rs. 20, when property is kept with us as collateral security."



The Magistrate acquitted the accused, and his main grounds seem to have been that there was no time-limit arranged between the pawnee and pawnor within which the articles were to be redeemed and that therefore they would not absolutely become the property of the pawnee at the expiration of a certain time, as no time-limit was fixed on. He held therefore that what was done by the respondents was not a taking in pawn. He discussed the English law on the subject of pawning and pawnbrokers ; but here in India I am of opinion that we must turn to the Indian law to arrive at a decision on the point at issue. Chapter IX of the Indian Contract Act (IX of 1872) deals with the law relating to bailment in this country. Section 148 of that Act gives the general definition of bailment, and sections 172 to 179 deal with the relating to pawnors and pawnees. A bailment is defined in section 148 as the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. Section 172 runs : "The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge.' The bailor is in this case called the 'pawnor.' The bailee is called the 'pawnee.' " It will be noted that nothing is said about a time being fixed for payment of the debt in the section. Nothing is said about time in sections 173, 174 and 175. Section 176 is the one that gives the pawnee the right to sell the property pledged. In respect of a debt it accrues when the pawnor makes default in payment of it and not at the expiration of any fixed time. For instance, in the present case it would seem to accrue when the Chetty demanded his debt and it was not paid. Section 177 provides for the pawnor's right to redeem, where a time is stipulated for the payment of the debt. It assumes a stipulated time in its opening words. Sections 178 and 179 do not concern the point at issue. It seems to me that there can be a taking in pawn even though no fixed time be agreed on for repayment of the loan on account of which goods are deposited as security.

It remains to consider whether in the present case the second accused is proved to have carried on the business of a pawnbroker. The mere taking of goods as security for money lent would certainly not make the lender a pawnbroker. To show that a person comes within the definition of pawnbroker it seems to me that it must be proved that he carries on the business of lending money on the security of goods pledged with him and that he holds himself out to lend money on such security and is in the habit of doing so.

The particular form of pawnbroker that the bye-laws made by the Rangoon Municipal Committee apply to is one who carries on the business of taking goods and chattels in pawn for loans of money not exceeding Rs. 250 in any one transaction, provided that nothing in the bye-laws shall apply to persons taking goods and chattels in pawn for loans exceeding Rs. 100 when the rate of interest or other profit does not exceed 15 per cent. per annum.

It is proved that the second accused comes within this definition of pawnbroker ? It is proved that he took goods in pawn for two loans

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of Rs. 20 and Rs. 10, and when called on for his defence he contended that the action was not a taking in pawn, but that he merely made loans of money keeping certain articles as security for the debt. He further explained that he did not take an "on demand" note for the loan of Rs. 10 *as they did not take such receipt for loans of less than Rs. 20, when property was kept with them as collateral security.* This last statement shows that they are in the habit of taking property as collateral security for debts.

Considering that every Chetty carries on the business of a money-lender and holds himself out as such, it seems to me that from the proved facts and this admission the second accused does come within the definition of pawnbroker as defined by the Municipal bye-laws. He has in the way of business, and in the pursuit of his business as such, taken goods in pawn for security for payment of debts and he has held himself out to do so.

In my opinion his defence does not hold good. The taking of goods as security seems to me to be a taking in pawn. I am therefore of opinion that he has broken bye-law 2 of the rules published under Notification No. 81, dated 17th July 1899, and framed under section 142, clause (e), of the Burma Municipal Act, 1898.

The first accused, his clerk, is equally guilty with him, as with him he has been carrying on this business. I set aside the order of acquittal and find N. A. S. O. Somasundrum Chetty guilty of an offence punishable under section 180 (1) of the Burma Municipal Act, and I direct that he pay a fine of Rs. 20 (twenty) or that in default he suffer simple imprisonment for seven (7) days.

I further find Kanappa Chetty guilty under the same section and direct that he pay a fine of Rs. 10 (ten) or that in default he suffer simple imprisonment for four (4) days.

Criminal  
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No. 9B of  
1907.

February  
27th, 1907.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. MI HARI MA.

Conviction—Order for compensation for illegal seizure of cattle—Appeal—Cattle Trespass Act, 1871, s. 22—Criminal Procedure Code, ss. 4(v), 241, 243, 245 246, 407.

An order for compensation under section 22, Cattle Trespass Act, for the illegal seizure or detention of cattle is a conviction within the meaning of the Code of Criminal Procedure, and is therefore appealable.

Sein Ban Aung made a complaint to a second class Magistrate under section 20 of the Cattle Trespass Act against Mi Hari Ma. The Magistrate ordered Mi Hari Ma to pay Rs. 21 compensation and to refund Rs. 7 court-fees. Mi Hari Ma applied for revision to the District Magistrate, who has sent up the records to this Court with a recommendation that the order be set aside.

It is necessary in the first place to ascertain whether an appeal lies against the Magistrate's order, for if an appeal lies, this Court is debarred by the fifth clause of section 439 of the Code of Criminal Procedure from interfering in revision.

Section 4 (o) of the Code of Criminal Procedure defines an offence as including any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871. Clause (v) of the same section defines a summons case as a case relating to an offence and not being a warrant case. Therefore the present case is a summons case. Section 241 prescribes that the procedure set out in Chapter XX shall be observed by Magistrates in the trial of summons cases. Sections 243, 245 and 246 provide for convicting the accused. Therefore it seems to me that the Magistrate's order in this case must be regarded as a conviction within the meaning of the Code of Criminal Procedure.

Section 407 enacts that any person convicted by a Magistrate of the second class may appeal to the District Magistrate. Thus I am led by an unbroken chain of reasoning to the conclusion that an appeal lies to the District Magistrate against the order in the present case.

I direct that the records be returned to the District Magistrate, who will deal with Mi Hari Ma's petition as an appeal.

*Before Mr. Justice Irwin, C.S.I.*

KING-EMPEROR v. THA NYO U AND SHWE TUN U.

*Refund of complaint and process fees—Complaints of illegal seizure of cattle—Court Fees Act, 1870, s. 31—Cattle Trespass Act, 1871, s. 20.*

The direction contained in section 31, Court Fees Act, for the refund of complaint and process fees in case of conviction applies to complaints made under section 20, Cattle Trespass Act, of the illegal seizure or detention of cattle.

Section 22 directs that the Magistrate shall award to the complainant, for the loss caused by the seizure and detention of the cattle, reasonable compensation not exceeding one hundred rupees, together with all fines paid and expenses incurred in procuring the release of the cattle.

Complainant said that he had paid Rs. 19-8-0 to the pound-keeper to release the cattle. He did not claim any other expenses incurred, and he made no claim for compensation for loss caused by the seizure.

The amount paid was not disputed. The Magistrate found that the accused was liable to refund the amount complainant had paid, viz., Rs. 19-8-0, but he ordered accused to pay Rs. 23 as "compensation," and nothing else.

The complainant, not having claimed any compensation, was not entitled to any. He was entitled to a refund of the Rs. 19-8-0 which he had paid, and he was also, under section 31, Court Fees Act, entitled to a refund of the fee paid on the complaint and the process-fees which he had paid, total Rs. 2-8-0, because the word "offence," in the Code of Criminal Procedure, includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act. "Offence" is not defined in the Court Fees Act. If it had the meaning assigned to it in section 3 of the General Clauses Act, 1897, then section 31 of the Court Fees Act would not apply to the present case, but the Court Fees Act is not one of the Acts specified in clause (2) of section 4 of the General Clauses Act. It is therefore necessary to construe the word "offence" without reference to the

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General Clauses Act, and as section 31 of the Court Fees Act governs procedure, just as much as section 250 of the Code of Criminal Procedure, I think it is reasonable to assign to the word "offence" in the former section the same meaning that it has in the Code of Criminal Procedure.

Criminal  
Revision  
No. 1260 of  
1906.  
January  
29th, 1907.

Before Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

KING-EMPEROR v. MI PYU.

Bond for good behaviour and to appear and receive sentence when called upon—  
Execution of, by minor—First offender released on probation—Criminal Procedure Code, s. 118, proviso 3, s. 562.

The third proviso to section 118, Criminal Procedure Code, that a bond for keeping the peace or for good behaviour in respect of a minor shall be executed only by his sureties, does not apply to bonds of first offenders released on probation under section 562, Criminal Procedure Code.

*King-Emperor v. Nga Pan Tin*, 2 L.B.R., 137, overruled.

*King-Emperor v. Nga Po Chon*, 2 L.B.R., 168, referred to.

*Irwin, J.*—Mi Pyu, aged 15, was convicted of theft, and the Magistrate ordered that she should be released under section 562 of the Code of Criminal Procedure on entering into a bond with two sureties for her good behaviour for six months, and to appear and receive sentence when called upon.

The District Magistrate remarked in revision, "The accused being a minor should not have been bound down personally." This remark is in accordance with the ruling of Birks, J., in *King-Emperor v. Nga Pan Tin* (1), which was repeated by the same learned Judge as an *obiter dictum* in *King-Emperor v. Nga Po Chon* (2). The ground of the ruling is that the provisions of section 118, clause (3), Code of Criminal Procedure, apply to bonds given under section 562.

I am unable to concur in that opinion. The third proviso to section 118 applies in terms only to bonds given under that section, which is seldom used against minors, and when a similar provision is not found in section 562, which was enacted chiefly for the benefit of youthful offenders, I think it must be presumed that the omission was intentional.

The reason of the proviso to section 118 is no doubt the incapacity of a minor to contract, but to my mind that does not justify us in giving a forced and unnatural construction to the words of section 562, which are quite clear, *viz.*, "on his entering into a bond, with or without sureties."

In my opinion the third proviso to section 118 does not apply to bonds given under section 562, Code of Criminal Procedure.

*Hartnoll, J.*—I concur.

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No. 31 (b)  
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Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. PO KAN AND MI SAW.

Complaint—Report by Superintendent of Vaccination—Vaccination Act, 1880, s. 18—Order for costs—Court Fees Act, 1870, s. 31.

A report made by a Superintendent of Vaccination under section 18 of the Vaccination Act, that a notice issued by him has not been complied with, is not a

(1) 2 L.B.R., 137

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(2) 2 L.B.R., 168.

complaint of an offence, and a Magistrate who makes an order for compliance with such notice cannot direct the refund of court-fees under section 31, Court-Fees Act, or the payment of costs.

The Magistrate made an order under section 18 of the Vaccination Act, 1880, directing Po Kan and Mi Saw to present their child for vaccination. At the same time he ordered them to pay one rupee costs, which seems to represent the court-fee paid for service of the summons.

The order to pay costs is illegal. There is no authority for it in the Vaccination Act. Section 31 of the Court Fees Act does not apply, because the offence made punishable by section 22 (b) of the Vaccination Act is disobedience of the Magistrate's order, not disobedience of the Civil Surgeon's notice; therefore the Civil Surgeon's report to the Magistrate is not a complaint of any offence.

I set aside the order to pay costs, and I direct that the amount be refunded to Maung Po Kan and Mi Saw.

Before the Hon'ble Mr. C. E. Fox, Chief Judge.

KONG LONE v. MA KAY.

Sealy and S. S. Pather—for applicant. | Agabeg—for respondent.

Order for disposal of property by Criminal Court—Criminal Procedure Code, s. 517—  
Pledge of goods received in pawn in good faith from person in possession—  
Possession obtained by fraud—Indian Contract Act, 1872, s. 178, proviso 2.

B asked A for some jewels promising to sell them for A or, if not sold, to return them the same evening. A was induced by this promise to hand the jewels to B. Instead of selling them, B pawned them the same day for about a third of their value and then disappeared for four days. On being prosecuted she pleaded guilty to a charge of criminal breach of trust under section 406, Indian Penal Code, and stated that she had pawned the jewels because she was pressed for money by a creditor. The Magistrate at the close of the trial ordered the jewels to be returned to A.

Held,—that the circumstances was sufficient to constitute at least a *prima facie* case of fraud, within the meaning of the second proviso of section 178, Indian Contract Act, on the part of B in obtaining the jewels. The order of the Magistrate for the return of the jewels was therefore upheld.

The Magistrate should not have made an order for delivery of the jewels to the complainant without giving the person from whom they had been taken an opportunity of being heard.

An appeal lay in the case, although it was only as to the extent or legality of the sentence. Sub-section (3) of section 517 of the Code of Criminal Procedure consequently applied, and the Magistrate should not have allowed his order to be carried out until the period allowed for presenting such appeal had passed. I am, however, not disposed to interfere with the Magistrate's order, because it appears to me that the evidence disposes a *prima facie* case of the jewels having been obtained from the owner by means of an offence or fraud within the meaning of the second proviso to section 178 of the Contract Act. The complainant stated that the accused in the case, a broker in jewellery, came to her for the jewels, promising to sell them, and

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MA KAY.

if they were not sold by the evening to return them. The jewels were worth Rs. 1,260. The accused did not return the jewels that day, and could not be found for four days. She had, instead of selling the jewels, pawned them for Rs. 427 at a pawn shop on apparently the day she received them.

The accused said she had done so because she was pressed for money by a creditor. It is very improbable that the importunity of this creditor began, and that the accused conceived the idea of raising money for herself by pawning the jewels, only after she had received them. Her conduct points to fraud and the offence of cheating on her part at the time she went and asked for the jewels, and induced the complainant to let her have them on her promise to return them that very day if she did not succeed in selling them.

There is at least a *prima facie* case of fraud and dishonesty on her part in obtaining the jewels from the owner of them.

Under the circumstances an order for the return of the jewels to the owner would be justifiable.

For these reasons I decline to interfere with the order. It is open to the pawnbroker to bring his claim of having a lien on the jewels before a Civil Court.

Criminal  
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No. 1130 of  
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January  
30th, 1907.

Before Mr. Justice Hartnoll.

KYIN TON v. E CHO.

Lentaigue—for applicant. | J. R. Das—for respondent.

*Disposal of property seized by police, Magistrate's order for—Restitution to person in possession—Criminal Procedure Code, s. 523—High Court, Powers of, in revision—Criminal Procedure Code, s. 439.*

When a Magistrate passes an order under section 523, Criminal Procedure Code, for the disposal of property that has been seized by the police, he is required to exercise a judicial discretion. In the absence of anything to show the title to the property, it should be restored to the party in whose possession it was at the time of its seizure.

The High Court, though it may set aside the order made by a Magistrate in such a case, has no power to order restitution of the property.

*Emperor v. Bahinui*, (1902) 5 Bom. L.R., 25 followed.

*In re Annapurnabai*, (1877) I.L.R. 1 Bom., 630; *In the matter of the petition of Basudeb Surma Gossain*, (1887) I.L.R. 14 Cal., 834; referred to.

In this case Maung E. Cho laid a complaint of theft against Maung Kyin Ton in respect of an elephant.

The result of the police enquiry was that the case was not one of theft, and it was recommended that it be shown as mistaken and that the parties be referred to the Civil Court.

The District Magistrate then noted the case as "mistaken" on the 13th March last. On the same date Maung Kyin Tan made an application for the return of the elephant to him, stating that he was informed that the elephant had been handed over to Maung E. Cho during the pendency of the investigation, that an application had been made to the Assistant Superintendent of Police at Insein for the return of the

elephant, and that so far as he was aware no order had yet been passed by that officer.

The District Magistrate called for the police papers and on the 16th March passed the following order :—

In the absence of any agreement for the delivery of the elephant to Maung Kyin Ton it seems to me that the police were quite right in returning the elephant to Maung E Cho. I therefore decline to order return of the elephant to the applicant.

The present application has been made against that order, and I am asked to reverse it and order the return of the elephant to Maung Kyin Ton on the grounds that the complaint was proved to be false, that it was wrong inasmuch as the requirements of section 523 of the Criminal Procedure Code have not been carried out, and that the District Magistrate was wrong in upholding the unlawful action of the police in usurping the powers of a Civil Court and in giving the elephant to Maung Kyin Ton without a Magistrate's order as required by section 523 of the Code.

From an enquiry that has been made by this Court it has been ascertained that on the 13th January the police did take the orders of the Township Magistrate, Taikkyi, with regard to the disposal of the elephant and that that Magistrate ordered the elephant to be made over to Maung E Cho, pending the disposal of the case, on good and sufficient security. It also appears that the elephant was handed over to Maung E Cho on a security bond for its appearance when required being executed.

This order of the Magistrate has been entirely overlooked. It will be observed that it was not a final but an *ad interim* one.

The question for consideration remains as to under what law the order of the District Magistrate of the 16th March was passed, or may be taken to have been passed.

Though he did not know of all the facts, I think that it may be taken that he was acting under section 523 of the Criminal Procedure Code and that by it he confirmed Maung E Cho in his possession. He had all the papers on the facts then before him. The order seems to me to have been a wrong one, and in support of my view I would quote the following words in the judgment in the case of *Emperor v. Bahin* (1) :—“Section 523 empowers a Magistrate to make ‘such order as he thinks fit regarding the disposal of property.’ But the discretion given by these words must be judicially exercised, and in the absence of anything to show the title to the property, it should have been ordered to be delivered to the person in whose possession it had been at the time of the attachment. Here in this case, as Maung E Cho charged Maung Kyin Ton with theft, it is clear that the possession was with Maung Kyin Ton. This also appears to be so from the final report of the police.

I accordingly set aside the order of the District Magistrate. I do not order the return of the elephant to Maung Kyin Ton as this Court

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has no power to order restitution, as was held in the above-quoted case, which cited two earlier cases,—*In re Annapurnabai* (2) and *In the matter of the petition of Basudeb Surma Gossain* (3)—to the same effect.

Civil  
Revision  
No. 127 of  
1905.

Before Mr. Justice Hartnoll.

MA KYIN v. A. S. MUTU RAMAN CHETTY, (2) KO CHET, (3) THE NU,  
(4) SHWE PAUNG

A. D. Nariman for N. M. Cowasjee—for applicant (plaintiff).

January 31st,  
1907.

*Sale of perishable property under attachment during pendency of application for removal of attachment—Sale-proceeds—Civil Procedure Code, ss. 278, 498.*

Where moveable property under attachment is sold to prevent waste or deterioration during the pendency of an application under section 278, Civil Procedure Code for the removal of the attachment, the sale-proceeds should be placed in deposit as representing the property sold, and should follow the results of the proceedings for removal of attachment.

The District Judge states that his reason for ordering the paddy to be sold, the sale proceeds being placed in deposit, was in all probability due to the facts that the paddy was lying on the threshing-floor and that it would deteriorate if it was left there any longer. He also states that it is the common practice in such cases to allow a successful claimant under section 278 of the Civil Procedure Code, to withdraw the sale-proceeds of the attached property as being legally entitled thereto apart from any agreement on the part of the attaching creditor. He does not remember and thinks it improbable that there was any specific agreement between the parties in this case that the sale-proceeds should follow the final order in the proceedings for the removal of attachment.

It seems to me that in any case where moveable property is sold to prevent waste or deterioration, and where at the time there are pending proceedings for removal of attachment taken under section 278 of the Civil Procedure Code, the sale-proceeds should be kept in deposit and should be taken to represent the property that has been sold and that they should follow the result of the order passed in the removal of attachment proceedings. In the present case I am of opinion that considering the custom of the Court, the order of the 15th March, \* and the wording of section 498 of the Civil Procedure Code, which states that property may be sold by the Court on such terms as it thinks fit, the parties must have understood that the sale-proceeds were to follow the order in the proceedings for removal of attachment and that that was the intention of the Judge when he passed the order for sale.

I therefore set aside the order of the District Judge and order and direct that the sale-proceeds, Rs. 1,296, be paid to Ma Kyin.

I also award her as costs of this application two gold mohurs.

(2) (1877, I.L.R. 1 Bom., 630. | (3) (1887) I.L.R. 14 Cal., 834.

\* The order of the 15th March directed the sale of the paddy.



### Full Bench—(Civil Reference.)

Before Sir Herbert Thirkell White, K.C.I.E., I.C.S., Chief Judge, Mr. Justice Bigge, and Mr. Justice Birks. Civil Reference, No. 9 of, 1903.

MANECK BAI, BY HER DULY CONSTITUTED ATTORNEY BICKERJEE  
BURJORJEE v. P.L.S.A. MOOTHIA CHETTY. February 9th 1904.

R.S. Dantra—for applicant (plaintiff).  
Israil Khan—for respondent (defendant).

Order dismissing suit for default—Decree—Application to set aside dismissal of suit—Deposit in Court or security—Civil Procedure Code, ss. 2, 102, 103—Provincial Small Cause Courts Act, 1887, s. 17 (1).

An order dismissing a suit under section 102 of the Code of Civil Procedure does not involve the making of a "decree" within the meaning of section 2 of the Code. The proviso to sub-section (1) of section 17 of the Provincial Small Cause Courts Act, which requires an applicant for an order to set aside a decree *ex parte* to deposit the amount due or to give security, does not apply to it.

*Mansab Ali v. Nihal Chand*, (1893) I.L.R. 15 All., 359; *Chand Kour v. Palab Singh*, (1888) I.L.R. 16 Cal., 98; *Gilkinson v. S. Ayyar*, (1898) I.L.R. 22 Mad., 231; followed.

*Ramchandra Pandurang Naik v. Madhav Purushottam Naik*, (1891) I.L.R. 16 Bom., 23; *Radha Nath Singh v. Chandi Churn Singh*, (1903) 7 C.W.N., 486; *Bahadur Panday v. Phool Chand Gajaud*, Civil Miscellaneous No. 189 of 1889; *Radha Nath Singh v. Chandi Charan Singh*, (1903) I.L.R. 30 Cal., 660; dissented from.

*Maharaja Dhiraj Maharana Shir Munsingji v. Mehta Harharram Nar harram*, (1894) I.L.R. 19 Bom., 307; *Anwar Ali v. Jaffer Ali*, (1896) I.L.R. 23 Cal., 827; *Jagannath Singh v. Budhan*, (1895) I.L.R. 23 Cal., 115; *William v. Brown*, (1886) I.L.R. 8 All., 108; *Lehkia v. Bhauna*, (1895) I.L.R. 18 All., 101; *Mussummat Jamina Bibi v. Seri Chand Bhagat*, (1898) 2 C.W.N., 693; referred to.

The following reference was made to a Full Bench by Mr. Justice Fox:—

The plaintiff's suit was dismissed under section 102 of the Code of Civil Procedure in consequence of her not having appeared personally or by agent or pleader when the case was called on the day of hearing. Upon the order of dismissal a decree was drawn up and signed, and under that decree the plaintiff was ordered to pay the defendants' costs.

An application was subsequently made on behalf of the plaintiff under section 103 of the Code to set aside the dismissal. This application was dismissed because no deposit of the costs due by the plaintiff under the decree had been made at the time of presenting the application, nor had security for the amount been given. The learned Judge held that the proviso to sub-section (1) of section 17 of the Provincial Small Cause Courts Act applied.

The plaintiff made another application to set aside the dismissal; this was granted by the Small Cause Court Judge, but his order was set aside by this Court on revision.

The present application is to set aside the first order dismissing the application to set aside the dismissal of the suit.

The ground relied upon is that the learned Judge erred in law in holding that the application had to be dismissed because the plaintiff had not complied with the requirements of the proviso to sub-section (1) of section 17 of the above Act in regard to an application to set



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aside a decree passed *ex-parte*. It has been contended that the dismissal of a suit under section 102 of the Code does not involve a decree against the plaintiff in the sense of the term "decree" as defined in section 2 of the Code. If, however, an order under section 102 does involve a decree being made, it is contended that in view of the provisions of sections 100, 101 and 108 of the Code, such decree does not constitute a "decree passed *ex-parte*," and consequently the proviso to sub-section (1) of section 17 of the Provincial Small Cause Courts Act does not apply to such a case.

It appears to me that the questions raised are questions of some importance, which should be settled in this Court's jurisdiction by the decision of a bench of the Court.

I therefore refer to a Bench of the Court the following questions:—

- (1) Does an order dismissing a suit under section 102 of the Code of Civil Procedure involve a "decree" against the plaintiff being drawn up and made?
- (2) If so, is such decree a "decree passed *ex-parte*," and does the proviso to sub-section (1) of section 17 of the Provincial Small Cause Courts Act apply to it?

*The opinion of the Bench was as follows:—*

*Birks, J.*—The present reference appears to have arisen out of Civil Revision No. 47 of 1903. The point raised in that case was whether the petitioner, having failed to make a deposit under section 17 of the Provincial Small Cause Courts Act on his first application to restore a suit dismissed for default, could make a fresh application on payment of such deposit. It was held by me that, the Judge having considered a deposit necessary at the first application to restore the suit, a second application could not be made.

The questions now raised were then argued, and I find I expressed an opinion that an order passed under section 102 was an adjudication within the meaning of the definition of a decree in section 2 of the Code, which, so far as regarded the Court expressing it, decided the suit or appeal.

In that opinion I followed the view taken by Birdwood, J., in *Ramchandra Pandurang Naik v. Madhav Purushottam Naik* (1).

This decision was subsequently approved by Sir Charles Sargent and Mr. Justice Fulton in *Maharaja Dhiraj Maharana Shir Mansingji v. Mehta Harihararam Narhararam* (2), where it was held that an order dismissing a suit under section 136, Civil Procedure Code, was a decree within the meaning of the definition in section 2.

The applicant relies mainly on the following rulings:—*Mansab Ali v. Nihal Chand* (3), *Chand Kour v. Patab* (4), *Gilkinson v. S. Ayyar* (5), *Anwar Ali v. Jaffer Ali* (6).

It would appear that up till the decision of *Radha Nath Singh v. Chandi Churn Singh* (7), the weight of authority had been rather against the view taken by one of the Judges of Bombay High Court.

(1) (1891) I.L.R. 16 Bom., 23.  
(2) (1894) I.L.R. 19 Bom., 307.  
(3) (1893) I.L.R. 15 All., 359.

(4) (1888) I.L.R. 16 Cal., 98.  
(5) (1898) I.L.R. 22 Mad., 221.  
(6) (1896) I.L.R. 23 Cal., 827.

(7) (1903) 7 C.W.N., 486.

In that case, however, the whole of the authorities available were considered, and a Full Bench consisting of five Judges held, by a majority of four, that an order of dismissal of an appeal for default amounts to a decree within the definition of section 2 of the Civil Procedure Code.

I concur in the view taken by the learned Chief Justice in that case that "the formal expression of an adjudication does not necessarily imply that it should be preceded by argument or a judgment." The section does not say an adjudication upon the "merits" but upon "any right claimed or defence set up"

I am aware that it is proposed to exclude orders passed under section 102 from the definition of a decree in the new draft Procedure Bill, but as I have pointed out the weight of authority up to the decision of the Calcutta Full Bench Reference was rather in favour of the view that an order dismissing a suit or appeal for default was not within the definition of a decree.

In the case of *Anwar Ali v. Jaffer Ali* (6), it was pointed out in the course of the argument that section 119 of Act VIII of 1859, which corresponds to section 102 of the present Code, expressly took away the right of appeal. It was argued there that the omission of a similar provision in the subsequent Codes showed that the Legislature considered that orders under section 102 were decrees and appealable as such under section 540. It appears to be the intention of the Legislature to revert to the old law. This particular argument does not appear to have been referred to in any of the decisions I have quoted, but it seems to favour the view taken by the Bombay High Court and now adopted by the Calcutta High Court.

I can see no reason why an order rejecting a plaint should be a decree, while an order dismissing a suit under section 102, which would necessitate the drawing up of some formal order for costs, is not.

For these reasons I think the views expressed by me in Civil Revision No. 47 of 1903 were correct, and I would answer the first question addressed to use in the affirmative.

With regard to the second question I think it follows on the first. If an order passed under section 102 is a decree within the meaning of the definition, it is necessarily an *ex-parte* decree for the defendant appears and the plaintiff does not.

It is no doubt true that the Legislature has consistently maintained a different nomenclature for suits decreed *ex-parte* and for suits dismissed for default. The distinction is apparent in section 119 of Act VIII of 1859, which commences as follows: "No appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared or from a judgment against a plaintiff by default of non-appearance."

It is argued that section 17 of Act 9 of 1887 is only intended to apply to cases where the plaintiff obtains an *ex-parte* decree, and not to a defendant who obtains judgment by default. The object of the section must be considered. It was doubtless introduced to secure a prompt despatch of judicial business and to secure finality. A review is only allowed if the applicant deposits the amount due under the decree sought to be reviewed. In the case of an *ex-parte* decree in

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favour of the plaintiff the defendant must deposit the amount given under the decree even though as a matter of fact he may never have been served. It would seem anomalous to hold that a plaintiff who has filed a suit in a Small Cause Court and neglected to appear on the date fixed should not be required to deposit the cost incurred by the defendant who has appeared, on these purely technical grounds. I would therefore answer the second question in the affirmative.

Since drafting the above judgment I have had the advantage of seeing the able and exhaustive judgment of the learned Chief Judge. As I regret I am unable to concur in that opinion, I think I should add a few remarks in support of the views I hold.

I think the Codes of Civil Procedure, No. VIII of 1859, X of 1877 and XIV of 1882, all seem to contemplate that suits and appeals once admitted and registered should end in a final decree.

Section 206 of the present Code is word for word the same as section 206 of Act X of 1877, which gives no separate definition of an "order" as contrasted with a "decree." It is also very similar to section 189 of the Code of 1859, which does not even define a decree.

The principle followed in all these Codes has been to trace the progress of a suit from the filing of the plaint to final decree.

I think it is clear from a comparison of sections 2, 102 and 540 of Act X of 1877 that the effect of these changes was to give a right of appeal against an order dismissing a suit for default, which did not exist under section 119 of Act VIII of 1859.

If the Legislature had intended to restrict that right and to depart from the previous practice of requiring decrees to be drawn up in all regular suits, there would have been some express words in the definition of a decree or in section 206 to that effect in the Act of 1882.

It can hardly be argued that it was the intention of the Legislature to restrict a right of appeal otherwise existing for section 540 of Act XIV of 1882 has been amended by Act XII of 1891 so as to include an *ex-parte* decree.

It may be noted that nearly every conceivable order is included under section 588 as subject to appeal, and if an order under section 102 was not included, it appears to be due to the fact that it is a final decision in a regular suit which comes within the definition of a decree and is therefore appealable under section 540. It does not appear to affect the question that another and cheaper remedy is provided by section 103.

*Thirkell White, C.J.*—The first question referred to us is whether an order dismissing a suit under section 102 of the Code of Civil Procedure involves the drawing up and making of a "decree" against the plaintiff. I understand that the word "decree" in the question proposed in the reference means a decree within the definition of that word in section 2 of the Code of Civil Procedure.

It will be convenient first to recite the authorities on the point. In *Chand Kour v. Palab Singh* (4), their Lordships of the Privy Council held that the dismissal of a suit in terms of section 102 of the Code of Civil Procedure was plainly not intended to operate in favour of the defendant as *res judicata*. This ruling was cited by the High Court at

Allahabad in *Mansab Ali v. Nihal Chand* (3), as supporting the ruling that an order dismissing a suit or appeal in default is an order, not a decree, as those terms are defined in the Code of Civil Procedure. Earlier rulings of the same Court were cited and followed; and a Bombay case, mentioned below, was dissented from. Two cases of the Calcutta High Court, *Jagarnath Singh v. Budhan* (8) and *Anwar Ali v. Jaffer Ali* (6), to the same effect, cannot be relied on, as they have recently been overruled. In *Gilkinson v. Subramania Ayyar* (5), it was held, in accordance with the Allahabad ruling cited above, that an order passed under section 102 of the Code of Civil Procedure is not a decree.

On the other hand, in the unreported case of *Bahadur Panday v. Phool Chand Gajanud* (9) it was held by the learned Recorder of Rangoon, Mr. (afterwards Sir William) Agnew, on a reference from the Court of Small Causes, that an order dismissing a suit under section 102 of the Code of Civil Procedure was a decree and, moreover, an *ex parte* decree within the meaning of section 17 of the Provincial Small Cause Courts Act. The learned Recorder contented himself with expressing concurrence in the view taken by the learned Judge of the Court of Small Causes, who relied on the Full Bench Ruling of the High Court at Allahabad in *Williams v. Brown* (10). In that case it was held that an order passed under section 381 of the Code of Civil Procedure, dismissing a suit for failure by the plaintiff to furnish security, was a decree in the suit. This case was not considered by the learned Judges who decided the case of *Mansab Ali v. Nihal Chand* (3) cited above. But it was considered in the later Full Bench Ruling of the same Court in *Lekha v. Bhauna* (11), and it was there held that an order rejecting an appeal under section 549 of the Code of Civil Procedure was not a decree. The ruling in *Williams v. Brown* (10) was distinguished as applying to the construction of section 381 and not to the construction of section 549 of the Code. The Recorder's ruling in the case cited above was a very early case, and it is possible that a different view might have been taken on consideration of the authorities now available.

In the case of *Ramchandra v. Madhav* (1), a Judge of the Bombay High Court held that an order dismissing an appeal for default must be regarded as failing within the definition of a "decree" contained in section 2 of the Code of Civil Procedure, for it is an adjudication adverse to the appellant's right to have his appeal heard, and it decides the appeal. The other Judge who sat upon the Bench in that case declined to express an opinion on the point.

In *Maharaja Dhiraj Maharana Shir Mansingji v. Mehta Harihararam Narhararam* (2), this was one of the cases relied upon by a bench of the Bombay High Court for the decision that an order under section 136 of the Code of Civil Procedure was a decree. This case was decided on the authorities, and Sargent, C.J., intimated that if the question had been *res integra*, a contrary conclusion might have been arrived at.

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(8) (1895) I.L.R. 23 Cal., 115.

(9) Civil Miscellaneous No. 189 of 1889.

(10) (1886) I.L.R. 8 All., 108.

(11) (1895) I.L.R. 18 All., 101.

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The case of *Mansab Ati v. Nihal Chand* (3) was not considered. Moreover, the case of a dismissal under section 136 is not precisely parallel to that of a dismissal under section 102, as no special remedy is provided for cases under the former section.

In the Calcutta Full Bench case of *Radha Nath Singh v. Chandi Charan Singh* (12), a majority of the learned Judges held that a decree based upon an order dismissing an appeal for default was a decree within the meaning of section 2 of the Code of Civil Procedure; and the two previous rulings of the same High Court were overruled. The latest Allahabad and Madras rulings on the subject were cited in argument but not referred to in the judgment of the Court.

In this conflict of authority, it is necessary to examine closely the sections of the Code of Civil Procedure which bear upon the point. Section 2 of the Code defines "decree" as "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal."

The section then gives three specific instances of orders which come within the definition; and an instance of orders not included in it. The latter part of the paragraph of the section containing these specific instances does not seem to affect the question under consideration, as an order dismissing a suit for default is not mentioned.

Under the next paragraph of section 2, "order" means "the formal expression of any decision of a Civil Court which is not a decree as above defined."

Section 102 of the Code directs that if the defendant appears and the plaintiff does not appear, the Court shall dismiss the suit, unless the defendant admits the claim wholly or in part. Section 103 provides that when a suit has been dismissed under section 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action; but he may apply for an order to set the dismissal aside. It is clear from the prohibition in section 103 that the dismissal of a suit under section 102 does not operate as *res judicata*. If it did so, there would be no need for the prohibition. And this has been pointed out by their Lordships of the Privy Council in the case first cited above. Therefore, in the terms of section 13 of the Code, when a suit has been dismissed for default under section 102, the suit cannot be held to have been heard and finally decided. Possibly this may turn on the use of the word "heard" in section 13. A suit dismissed for default cannot be said to have been "heard" and would therefore not come within the terms of that section. Yet this is not quite clear; for when a plaint is rejected, under section 54 of the Code, there has been or may have been no hearing. But it has been thought necessary to enact in section 56 that the rejection of a plaint does not preclude the presentation of a fresh plaint on the same cause of action. It seems to me that the decision that an order under section 102 of the Code does not operate as *res judicata* affords some support to the proposition that the order giving formal expression to the decision is not a decree.

The provision of a special remedy in section 103 supports the same conclusion. For if the dismissal under section 102 involved a decree within the meaning of section 2, there would ordinarily be an appeal under section 540. It seems improbable that, if there was a remedy by appeal, a separate remedy should be given in section 103. This is not conclusive; for there is an appeal against a decree passed *ex-parte*, though section 108 provides a special procedure for setting it aside. But the cases are not precisely parallel.

If the wording of the definition in section 2 is examined, it appears that the essence of a decree is that it must be the formal expression of an adjudication upon some right claimed or defence set up. When a suit is dismissed for default, can it be said that there has been an adjudication upon the right claimed by the plaintiff? The effect of the order of dismissal is to declare that by his default the plaintiff has forfeited his right to be heard in support of his claim. It does not seem to involve an adjudication on his claim.

It is clear from the conflict of authority that the point is one of great difficulty and uncertainty. But for the reasons set forth above, and especially on consideration of the wording of the definition of "decree," I am of opinion that the Allahabad and Madras cases should be followed and that an order dismissing a suit under section 102 of the Code of Civil Procedure does not involve the making of a "decree" within the meaning of section 2 of the Code; and I would answer the first question in the reference in these terms.

If that view is adopted, it is not necessary to answer the second question. But if the contrary view should prevail, there is authority for the position that a decree passed on an order of dismissal is not a decree passed *ex-parte* and that the proviso to sub-section (1) of section 17 of the Provincial Small Cause Courts Act does not apply to it. The ruling on the point, which was very fairly brought to notice by the learned Pleader for the respondent, is in the case of *Mussummat Jamina Bibi v. Seri Chand Bhagat* (13). In accordance with that ruling and mainly for the reason therein stated, I would answer both parts of the second question of the reference in the negative.

*Bigge, J.*—I concur and have nothing to add.

*Before Mr. Justice Irwin, C.S.I.*

MUTU RAMAN CHETTI *v.* MYAT NYEIN AND MA MYAT U.

*Pennell*—for appellant (plaintiff).

*Firm, Suit on behalf of or against—Partners—Agent—Names of parties in proceedings.*

A firm cannot sue or be sued, but the partners in a firm can.

The recognized agent of a party is not, as such, a party himself.

The Courts must be careful to enter the names of parties correctly in all proceedings, and especially in judgments and decrees. Neglect of such points may cause much confusion, and cause needless expense and delay to litigants.

This suit was instituted by plaintiffs S. M. Murgappa Chetti and R. M. Raman Chetti, carrying on business under the name of S. M. R. M. Aranachalam Chetti, by their agent Mutu Raman Chetti.

(13) (1898) 2 C.W.N., 693.

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**MYAT NYEIN.**

The Judge of the Township Court erroneously headed his judgment with the plaintiffs described as S. M. R. M. Aroona Chellum Chetty. A firm cannot sue or be sued : only the partners can sue or be sued. The plaintiff was correct, the judgment wrong.

The Judge made a further mistake by signing a decree in which the agent Mutu Raman is named as plaintiff without any mention of his principals.

Defendants appealed to the District Court, and they described the respondents as S. M. R. M. Aroona Challan Chetty by his agent Mutu Raman Chetty. This error was plainly a consequence of the error in judgment of the Township Court.

The Judge of the District Court made matters worse by heading his judgment with Mutu Raman Chetty as respondent. The error is repeated in the decree.

Mutu Raman Chetti has appealed to this Court. He says he is entitled to a mortgage decree. By the decree of the District Court Mutu Raman Chetti is ordered to pay costs. He is certainly entitled to have that order set aside, for he was not a party to the suit. But, for the same reason, he is not entitled to a mortgage decree, nor to any decree on the merits of the suit.

I set aside the decree of the District Court, and I direct that the memorandum of first appeal be amended by the defendants by striking out the name S. M. R. M. Aroona Challan Chetty, and inserting the names of the real plaintiffs, S. M. Murgappa Chetti and R. M. Raman Chetti, as respondents. The Township Court will amend the clerical errors in its judgment and decree. The District Court will then have before it the real plaintiffs who have never yet been before it, and will proceed to pass judgment afresh.

There will be no order for costs in the present appeal, but a certificate will be given to the appellant under section 13 of the Court Fees Act, to receive back the value of the stamp on the memorandum of appeal.

*Before Mr. Justice Irwin, C.S.I.*

**PO THET ALIAS THET SHE v. KING-EMPEROR.**

*House-trespass—Entering open space under a house—Entering an unvalled compound—Indian Penal Code, s. 442.*

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Neither the act of going under a house, where the space under it is not in any way enclosed, nor the act of entering an unvalled compound such as ordinarily surrounds a house in Burma, can be held to constitute house-trespass as defined in section 442, Indian Penal Code.

The inmates of the Mission compound at Insein were awakened by hearing dogs barking and fowls flying down from their roosts in trees. They caught appellant prowling in the compound. A hen basket which Maung Tin had tied on a coop under the house was found lying on the ground. It does not appear that the space under the house was enclosed in any way, and the Magistrate rightly held that going under the house was not an act of entering a building within the meaning of section 442, Penal Code; but he held that the Mission courtyard was itself a building, on the authority of ruling No. 35 of 1879 in the Punjab Record, in which a majority of the Court said that a courtyard

consisting of a walled enclosure with four chambers opening into it, and an outer door or gate leading into a side street, was a building; and following this ruling he convicted the appellant of lurking house-trespass by night.

The structure described by the Punjab Chief Court was evidently a courtyard surrounded by a high brick wall, and with rooms built against the wall on the inside. Such buildings, if they exist in Burma, are uncommon, and there is nothing on the record to indicate that the Mission compound bears any resemblance to such a building. Entering an ordinary compound such as both Europeans and Burmans commonly use is not house-trespass. But the act of moving the hen basket was theft, and it is a proper inference from the evidence that appellant moved it dishonestly, for two witnesses say it had been tied over the hencoop.

I therefore alter the conviction to one of theft under section 379, Penal Code. The sentence is suitable under section 75.

Before Mr. Justice Irwin, C.S.I.

STEPHEN AVIET v. KING-EMPEROR AND D. MANUAL.

*Order for disposal of property by Criminal Court—Criminal Procedure Code, s. 517—Pledge of goods received in pawn in good faith from person in possession—Question for Civil Court—Indian Contract Act, 1872, s. 178.*

A entrusted some jewels to B to sell for him. B did not sell them, but gave them to her niece C, who pawned them to D. B was convicted of criminal breach of trust, and the Magistrate ordered the jewels to be returned to A.

*Held*,—that the questions whether section 178, Indian Contract Act, applied in view of the fact that the jewels were pawned by C and not by B, and whether the circumstances were such as to bring the transaction within the first proviso to that section, were matters to be decided by a Civil Court. As A had given the jewels to B to be disposed of for money, and as they had been so disposed of, he was not entitled to relief in a Criminal Court. The Magistrate's order was set aside and the jewels were ordered to be returned to D.

*U Kyi v. Maung Pe*, Criminal Revision No. 1130 of 1905 (unreported); *Naganada Davay v. Rappu Chettiar*, I.L.R. 27 Mad., 424; *Greenwood v. Holquette*, 12 Ben. L.R., 42; referred to.

D. Manual, respondent, entrusted a pair of diamond nagats and a pearl necklace to Ma Me with instructions to sell them for him. Ma Me gave them to her niece Ma Thaik, who pawned them to Aviet, the present applicant. The jewels were taken from Aviet by the police. Ma Me was convicted of criminal breach of trust in respect of them, and the Magistrate ordered the jewels to be returned to Manual. Aviet applies to have that order set aside, and the jewels returned to him.

In the recent case of *U Kyi v. Maung Pe* (1), the learned Chief Judge directed some jewels to be returned to the purchaser, after the seller had been convicted of criminal breach of trust in respect of the sale-proceeds. That was a comparatively simple case. The diamonds had been entrusted to the accused to sell and she sold them. In the present case also the jewels were given to the accused to sell but

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she did not sell them ; her niece pawned them. I have to consider whether the pawnee is protected by section 178 of the Contract Act.

In *Naganada Davay v. Bappu Chettiar* (2), it was held that the possession intended by section 178 is the same kind of possession as that intended by section 108, namely, "the kind of possession which a factor or an agent has, where the owner of the goods, though he has parted with the possession, may give instructions to the person in possession what to do with the goods," as said by Couch, C.J., in *Greenwood v. Holquette* (3). I agree with that. Ma Me was clearly in the position of an agent for the sale of the jewels, and if she had pawned them herself she would have given Aviet a valid lien of them, provided that he acted in good faith and so forth.

It was not argued before me that Aviet's position is different by reason of the fact that the jewels were pawned not by Ma Me herself but by her niece. I think this question, if it be raised at all, and the question whether the circumstances were such as to raise a reasonable presumption that the pawner was acting improperly, ought to be left to a Civil Court, and the possession of the jewels ought not to be transferred in consequence of the police having seized them. The broad principle which brings this case into line with *U Kyi v. Maung Pe* (1), and which I think ought to guide the Magistrate, is that Manual having given the jewels to Ma Me to be disposed of for money, he is not entitled to the assistance of a Criminal Court in recovering them from a person to whom they were so disposed of.

I set aside the Magistrate's order, and direct that the jewels be returned to Aviet, from whom they were taken by the police.

Special Civil  
2nd Appeal  
No. 230 of  
1905.

Before Sir Charles Fox, Chief Judge.

TUN ZAN v. MAUNG NYUN.

Maung Thein—for appellant (2nd defendant).

McDonnell—for respondent (plaintiff).

January 14th,  
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Sale by registered deed—Verbal sale—Notice, Equitable doctrines of—Specific performance—Indian Registration Act, 1877, s. 48—Specific Relief Act, 1877, s. 27.

A sold to B by a registered deed land which he had already sold verbally to C. At the time of the second sale B had notice of the previous verbal sale to C. C sued both A and B for either the land or the return of his money.

Held,—that the equitable doctrine of notice applied notwithstanding the provisions of section 48 of the Registration Act, and that C was entitled to specific performance of the sale to him, as against both A and B.

*Waman Ramchandra v. Dhondiba Krishnaji*, (1879) I.L.R. 4 Bom., 126 ; *Chunder Nath Roy v. Bhoyrub Chunder Surma Roy*, (1883) I.L.R. 10 Cal., 250 ; *Chunder Kant Roy v. Krishna Sunder Roy*, (1884) I.L.R. 10 Cal., 710 ; referred to.

Both the lower Courts found that Nga Kaing sold the land to Maung Nyun verbally before he sold it to the appellant Tun Zan by a registered deed.

Both Courts also found that Tun Zan had actual notice of the fact that Nga Kaing had sold the land to Maung Nyun before he bought the land.

(2) (1903) I.L.R. 27 Mad., 424.

(3) 12 Ben. L.R., 42.

I see no reason to differ from these findings.

In such a case the equitable doctrines of notice apply notwithstanding the provisions of section 48 of the Registration Act—see *Waman Ramchandra v. Dhondiba Krishnaji* (1), *Chunder Nath Roy v. Bhoyrub Sunder Surma Roy* (2), and *Chander Kant Roy v. Krishna Sunder Roy* (3).

The suit in this case was not in form a suit for specific performance, but it was so in effect. The plaintiff sued for the land or his money, making the vendor and the subsequent purchaser with notice of his previous purchase parties.

Under clause (b) of section 27 of the Specific Relief Act he was entitled to a decree for specific performance of the sale to him as against both his vendor and the subsequent purchaser from his vendor who had notice of the sale to him.

All that remained for the specific performance of the contract to him was for him to be put in possession of the property. For this he sued, and on the facts found he was entitled to have a decree for possession. He does not complain of the decree of the Divisional Court, which leaves it optional to the defendants to pay him back the purchase money.

The appeal is dismissed.

#### Privy Council.

(On appeal from the Chief Court of Lower Burma.)

*Before Lord Davey, Lord Robertson, Sir Andrew Scoble, and Sir Arthur Wilson.*

BOMANJEE COWASJEE (DEFENDANT), APPELLANT *v.* THE CHIEF JUDGE AND JUDGES OF THE CHIEF COURT OF LOWER BURMA, RESPONDENTS.

*Advocate—Professional misconduct. Charge of—Value of evidence—Proof—Evidence Act, 1872, ss. 155, 157.*

The appellant, an advocate of the Chief Court, was convicted of gross professional misconduct in having advised a client, G, to bribe a witness in a case under trial at the Criminal Sessions of the Chief Court.

The charge against him was based on two conversations between appellant and E, his senior in the case. E's statement regarding these conversations was corroborated by certain persons to whom he had repeated their purport on the day they took place. Both these conversations were hurried; the actual words used in one were not completely remembered by E, and the words that were accurately remembered might, in certain contexts, have an innocent meaning; the other was a whispered conversation in Court during the examination of a witness by E. The charge was also supported by admissions made by the client G to E and to the Government Advocate, but G, when examined as a witness, denied having made these admissions.

*Held*,—that the admissions made by G, even if admissible to discredit his sworn statement as a witness, were not admissible as against appellant; that although the statements of the persons to whom E reported his conversations with appellant were admissible as supporting the credibility of E's evidence, the charge against appellant depended entirely on the correctness of E's impression of the affect of

(1) (1879) I.L.R. 4 Bom., 126.

(2) (1883) I.L.R. 10 Cal., 250.

(3) (1884) I.L.R. 10 Cal., 710.

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these conversations ; and that, considering the circumstances of the conversations and the probabilities of the case, the evidence was insufficient to support the grave charge against appellant.

This was an appeal from an order of the Chief Court dismissing the appellant from his office as an Advocate of the Court. The judgment of the Chief Court (the Hon'ble Sir Harvey Adamson, Chief Judge, Mr. Justice Fox and Mr. Justice Bigge) was as follows :—

Mr. Bomanjee Cowasjee is a Barrister-at-Law and an Advocate of this Court. In *King-Emperor v. E Maung and others*, Mr. Eddis and he, Mr. Eddis being the senior Advocate, appeared for the Crown throughout the proceedings in the Magistrate's Court and during the trial at the Criminal Sessions of this Court, having been retained by Ohn Ghine, the father of the complainant. The accused persons in that case were charged with having abducted Ohn Ghine's daughter Ma Nu. In the present proceeding Mr. Cowasjee is charged with two acts of gross professional misconduct in his employment in that case.

Ma Nu either eloped or was abducted on 16th July 1905. She was kept in concealment by E Maung from that date to 9th September 1905, and during that time, notwithstanding the efforts of the police and her relatives, it was not ascertained where she was. From her place of concealment she wrote, voluntarily or otherwise, to her mother, Ma Yeik, two letters, which were delivered in Rangoon on 27th and 30th July. In the meantime Ohn Ghine was in England whence he returned, arriving in Rangoon on 17th August. Certain persons were arrested on 17th July on the charge of abduction and were in custody throughout July and August. The gist of the two letters written by Ma Nu was that she was well and that she desired her parents to pardon her, to compromise the case and to withdraw the criminal proceedings. These two letters were not disclosed by Ma Nu's mother or relatives to the police or to Mr. Eddis, the senior Advocate, until Ohn Ghine's return from England on 17th August, although obviously in justice to the persons who were in custody on the charge of abduction, they ought to have been communicated to the police and to the Magistrate forthwith.

In the trial of the abduction case certain letters were produced, which were admittedly in the handwriting of Ma Nu. Certain other letters were produced by the defence which were alleged to be written by Ma Nu but were asserted by the prosecution to be forgeries. They were love letters purporting to be written by Ma Nu at a time prior to the abduction. Mr. Hardless, the Government of India Expert in Handwriting, happened to be in Rangoon during the trial, and the letters were made over to him for scrutiny. He was subsequently examined as a witness with the object of proving whether the letters produced by the defence were in the handwriting of Ma Nu. The documents were made over to Mr. Hardless on the 31st January. He scrutinized them between 31st January and 5th February, and his evidence was taken in the case Criminal Sessions on the 5th and 6th February.

These facts, with regard to which there is no dispute, are necessary to the understanding of the present proceedings.

The charges against Mr. Cowasjee originated in a statement made to the Government Advocate by Mr. Eddis, the senior Advocate for the prosecution in the abduction case, on the day after the conclusion of the trial. The Government Advocate communicated orally to Mr. Cowasjee the substance of Mr. Eddis' statement and after hearing what Mr. Cowasjee and Ohn Ghine had to say in the matter, and ascertaining from Mr. Eddis that their statements did not alter his confidence in his recollection of what had occurred laid the matter before the Judges of this Court in a written report. We forwarded this report to Mr. Cowasjee and invited him to give an explanation in writing, which he did. We then forwarded the Government Advocate's reports and Mr. Cowasjee's explanation to Mr. Eddis, and asked him to say whether in view of Mr. Cowasjee's explanation he adhered to or desired to modify the statements which he had made to the Government Advocate and invited him to give a full statement of the incidents in writing. Mr. Eddis furnished us with a statement in writing which we found to be irreconcilable with Mr. Cowasjee's explanation. We then framed charges against Mr. Cowasjee, and communicated them along with Mr. Eddis' statement to Mr. Cowasjee.

The first charge framed against Mr. Cowasjee was as follows :—

That you, whilst employed as an advocate for the prosecution of E Maung and others charged with having abducted Ma Nu, the daughter of Ohn Ghine and his wife Ma Yeik, having been made aware that some letters had been received by members of Ohn Ghine's family, which purported to be Ma Nu's, advised the family to say nothing about such letters having been received and designedly withheld from the police and from Mr. Eddis, the senior advocate conducting the prosecution, the fact that such letters had been received and you thereby were guilty of gross professional misconduct.

Mr. Eddis' account of this incident is that he first heard of the existence of these letters from Ohn Ghine on the 17th August, the day of his arrival from England. Next day he was at Ohn Ghine's house, and Mr. Cowasjee was also there. Mr. Eddis complained of the conduct of Ohn Ghine's relatives in keeping back from him letters that had been received by them eighteen or twenty days before. Mr. Cowasjee then made a statement the exact words of which Mr. Eddis cannot remember, but the substance of which was that he, Mr. Cowasjee, had told Ohn Ghine's relatives to keep the letters quiet and not to let any one know about them. Mr. Eddis did not remonstrate with Mr. Cowasjee at the time, but on the same day or next day he repeated the incident to Mr. McDonnell, the Commissioner of Police. Mr. McDonnell cannot remember the exact words used by Mr. Eddis but they were to this effect : "Just imagine, Cowasjee has known about the letters all the time." Mr. Eddis did not mention the matter to Mr. Cowasjee again until a considerably later date, when during the hearing of the case in the Magistrate's Court he said to Mr. Cowasjee that he (Cowasjee) had put him in a most unpleasant position in letting him say in the Magistrate's Court that no communication had been received from Ma Nu at a time when he was aware that letters had been received from her. Mr. Eddis cannot remember the exact words that he used, and he states that Mr. Cowasjee made no reply.

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Mr. Cowasjee's explanation of this incident is that as he was leaving Ohn Ghine's house two days before Ohn Ghine's arrival from England, Maung Sein, Ohn Ghine's son-in-law, told him that one or two letters had been received from Ma Nu along with several anonymous letters. Mr. Cowasjee replied that the letters would be gone into on Ohn Ghine's arrival. Within a day after Ohn Ghine's arrival he was in Ohn Ghine's house with Mr. Eddis. The letters had already been made over to the Commissioner of Police. He told Mr. Eddis exactly what had passed between Maung Sein and himself. He cannot remember any remark made subsequently by Mr. Eddis in the Magistrate's Court, but he suggests that Mr. Eddis may have said, "we (or I) have been put in an awkward position by the suppression of the letters." He denies that he ever advised concealment of the letters, or that Mr. Eddis ever imputed to him that he had given such advice.

Our view is that this incident is shrouded in considerable doubt. Mr. Eddis is not able to say that Mr. Cowasjee admitted to him that he knew of the existence of the letters at a time prior to two days before Ohn Ghine's arrival. Mr. Cowasjee's suggestion as to the words that may have been used in the Magistrate's Court is plausible. Mr. Eddis never demonstrated with Mr. Cowasjee in such a way as to render the facts clear.

On the other hand, Mr. Cowasjee's explanation is not very satisfactory. At the time when Mr. Cowasjee alleges that he heard of these letters, a month had already expired from the date of the abduction. No one knew whether Ma Nu was alive or dead. The case had created an enormous amount of excitement. It would be natural to expect that Mr. Cowasjee, having heard of these letters, would desire to see them at once, and would at once communicate their existence to the senior advocate in the case, instead of putting the matter off for two days, as if it were a thing of small importance.

The subject might have been cleared up by the evidence of the inmates of Ohn Ghine's house. The persons who must have known the facts are Ma Yeik, the mother of Ma Nu, to whom the letters were addressed, Maung Sein, the brother-in-law, and his wife Ma Mya, who is Ma Nu's sister. We summoned these persons as witnesses. Unfortunately we can come to no other conclusion than that they have deliberately told a tissue of lies. Ma Yeik and her daughter admit that they received the letters, as indicated by the postmarks, on 27th and 30th July. Ma Mya read them to Ma Yeik. Ma Yeik cannot even say that the letters were talked about in the family circle. Ma Mya states that she read the letters and put them in their envelopes in an almirah. She never mentioned their receipt to her husband or any one else. Maung Sein states that while he was looking for a coat he discovered the letters without envelopes in the almirah. This was four or five days before Ohn Ghine's return, and must therefore have been over a fortnight after the arrival of the letters. He read them and never even mentioned to his wife or to any one that he had seen them or made any inquiries as to how they had been received. He confirms Mr. Cowasjee's statement in saying that he mentioned them to him two days before Ohn Ghine's arrival. It is admitted that Maung Sein

and his wife and her mother were all on the best of terms. It is admitted that they were all in great distress on account of Ma Nu's abduction and concealment. Until they saw the letters they did not even know that she was alive. The conduct of these three witnesses, as divulged in their evidence, is absolutely and entirely incredible, and is inconsistent with the ordinary course of human conduct, and we have no hesitation in holding that their evidence is palpably false. They are, however, witnesses that were called by the Court, and not by Mr. Cowasjee. We have no authority for imputing the falsity of their evidence to him.

If Mr. Cowasjee's statement be true, and if all that he did was merely to postpone consideration of the letters for two days until Ohn Ghine's arrival, a charge of professional misconduct would not be sustainable against him merely on this incident.

Whilst we feel that the evidence leaves the matter in a very unsatisfactory condition, we are constrained to hold that it has not been proved that Mr. Cowasjee is guilty of the gross professional misconduct alleged in the first charge.

The second charge against Mr. Cowasjee is as follows :—

That you, whilst the trial of the said E Maung and others was proceeding at the first Criminal Sessions of this Court in this year, and when you were acting as one of the advocates for the prosecution, advised, suggested or hinted to the said Ohn Ghine that he should influence or attempt to influence Mr. Hardless a professing expert in handwriting, by improper means, in order that Mr. Hardless might be induced to express opinions favourable to the prosecution's case in connection with certain letters produced during the course of the said case, and you were thereby guilty of gross professional misconduct.

The letters had been made over to Mr. Hardless on Wednesday, 31st January. Mr. Hardless gave his evidence on Monday, 5th February. The events which we are now considering occurred on Friday, 2nd February.

Mr. Eddis states that on that morning just before 11 o'clock, the hour when the Court opens, he and Mr. Cowasjee and Mr. McDonnell were talking in the corridor. There was a rumour that Mr. Hardless, evidence would be favourable to the defence. In the course of the conversation Mr. Cowasjee remarked that Hardless must have been bribed, and he ended up with the words, "The bargain is not yet completed." Thereafter Mr. Eddis saw Mr. Cowasjee talking to Ohn Ghine in the corridor. Just on the stroke of eleven, Mr. Cowasjee took Mr. Eddis aside, as he was putting on his gown, in the Bar Library, which is a room off the corridor, and said that he (Cowasjee) had advised Ohn Ghine to bribe Hardless. Mr. Eddis is not sure of the exact words used, but that was the meaning. Mr. Cowasjee went on to say, and Mr. Eddis is absolutely certain of these words, "I have never advised a client to do such a thing before, but in this case I thought it was necessary." They were moving into Court and Mr. Eddis says that he was so taken aback that he said nothing at the time. When they got into Court Mr. Eddis said to Mr. Cowasjee that nothing of the kind could be allowed, and that he (Cowasjee) must tell Ohn Ghine so, to which Mr. Cowasjee made no reply. At the tiffin hour Mr. Eddis put it to Ohn Ghine that Mr. Cowasjee had advised

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him to bribe Hardless. Ohn Ghine at first denied it. Mr. Eddis said it was no use denying it as Cowasjee himself had told him. Then Ohn Ghine said, "Oh, Mr. Eddis, he just gave me a hint." Mr. Eddis is quite certain that these were the words used. Mr. Eddis then told Ohn Ghine that if he did not give him an assurance that nothing of the kind should happen he would retire from the case. On this Ohn Ghine gave the assurance.

Mr. McDonnell corroborates Mr. Eddis' statement that Mr. Cowasjee said, "The bargain is not yet completed." He says it was within five minutes of the time when the gong sounded for the opening of the Court. He says that in the tiffin interval on the same day Mr. Eddis came to his office and told him that Mr. Cowasjee had suggested that Ohn Ghine should bribe Hardless, and that Mr. Cowasjee had said that he had never done such a thing before. This witness differs from Mr. Eddis in unimportant details such as whether Mr. Eddis was wearing his gown at the time and as to the movements of Mr. Eddis and Mr. Cowasjee after the conversation in the corridor. But these are matters which naturally would not leave an impression on his mind. We attach no importance to these minor discrepancies, because we feel no doubt that both Mr. Eddis and Mr. McDonnell are witnesses who are telling the truth to the best of their ability.

Mr. Eddis in the tiffin interval related the circumstances to his colleagues Mr. Lentaigne and Mr. Clifton.

Mr. Lentaigne states what he remembers of his conversation with Mr. Eddis. Mr. Eddis told him that Mr. Cowasjee had informed him that he (Cowasjee) had advised Ohn Ghine to bribe Hardless, and that he had never advised a client to do so before, with a further remark of which he cannot exactly remember the words, but which was to the effect that the circumstances of the case justified it. Mr. Eddis also said that he had told Ohn Ghine that he would retire from the case if any such thing as bribing Hardless occurred.

Mr. Clifton's recollection of this conversation with Mr. Eddis is that Eddis told him that Mr. Cowasjee had used the words, "The bargain is not yet completed," also that Mr. Cowasjee had said that he had never done such a thing before, but in this case he had advised Ohn Ghine to outbit the defence. Mr. Eddis also said that he had told Mr. Cowasjee later on that he objected to anything of the sort being done, and that he had seen Ohn Ghine after the Court rose and had told him that if there was any suggestion of bribery he would retire from the case at once.

Mr. Cowasjee's explanation is that when he went to Court on the Friday morning he met Ohn Ghine, who told him that Hardless had been got at, and was going to give evidence against the prosecution. Mr. Cowasjee said he did not believe it. Ohn Ghine insisted that his information was correct, whereupon he (Cowasjee) lost his temper, and said that if the other side had done that he (Ohn Ghine) could have done so also. He then got his gown and went downstairs to the Original Side of the Court, where he had business. Coming up again he met Mr. Eddis at the top of the stairs, and told him all that had

passed between Ohn Ghine and himself. The gong then sounded and they went into Court. In the Court Mr. Eddis said to him, "This is a serious matter. You ought to speak to Ohn Ghine and tell him that there must be nothing of the kind." He (Cawasjee) laughed and said "Ohn Ghine is not such a fool as to misunderstand me." Mr. Eddis denies that Mr. Cawasjee said this or anything of the kind in Court.

Mr. Cawasjee denies that he used the expression, "The bargain is not yet completed," and denies that he said the words or anything that could be mistaken for the words, "I have never advised a client to do such a thing before, but in this case I thought it necessary." Mr. Cawasjee denies that Mr. Eddis had any conversation with him in the Bar Library.

Mr. Cawasjee admits that he knew when Mr. Eddis spoke to him in Court that Mr. Eddis had misunderstood him. In the light of after events this is a very important point. There can be no doubt as to Eddis, according to Mr. Cawasjee's admission, remonstrated with him for having suggested to Ohn Ghine that he should bribe Hardless. This is a very serious imputation for a barrister of long standing to make against another barrister of long standing, and if the imputation was made, as Mr. Cawasjee admits, we cannot doubt that it must have impressed itself strongly on Mr. Cawasjee's mind.

The importance of this fact appears when the evidence of Mr. Giles, the Government Advocate, is considered. Mr. Eddis had, on the day after the abduction trial was concluded, that is the 10th February, made a statement to Mr. Giles which, among other things, contained an accusation that Mr. Cawasjee had advised Ohn Ghine to bribe Hardless. On 27th February Mr. Giles had an interview with Mr. Cawasjee, and stated to him the substance of Mr. Eddis' accusations. With regard to that interview Mr. Giles says:—

In the course of that conversation I put to Mr. Cawasjee Mr. Eddis' account of how he had spoken to Mr. Cawasjee in the Sessions Court, saying that there must be nothing of that sort, or else he would leave the case and that Mr. Cawasjee must so inform Ohn Ghine. Mr. Cawasjee said there was nothing of the kind. He certainly never suggested to me that Mr. Eddis' remark had been made and answered as he states in his explanation to this Court.

Mr. Cawasjee says that, so far as he can remember, at his interview with Mr. Giles, not a word was said as to what passed between him and Mr. Eddis in the Sessions Court. We have not the slightest hesitation in believing Mr. Giles' evidence that he did put to Mr. Cawasjee Mr. Eddis' account of what occurred in the Court.

The circumstances appear to us to raise very damning and very conclusive inferences. Mr. Cawasjee's defence implies that he knew that his senior advocate in the case had imputed to him behaviour of a most improper kind. We cannot believe but that if this were the case, it must have left a very strong impression on Mr. Cawasjee's mind. We cannot believe that Mr. Cawasjee could have forgotten that the incident was put to him by Mr. Giles. On the contrary we have no doubt that if the events that occurred in the Sessions Court

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were such as Mr. Cowasjee now describes them to be, they must have been fresh in his memory during his interview with Mr. Giles, and would have been related to him. The irresistible inference is that the portion of the defence which relates to the events that occurred in the Sessions Court is not true, and that it was concocted after the interview between Mr. Giles and Mr. Cowasjee.

The only reliable evidence as to what Mr. Cowasjee said to Ohn Ghine on the corridor on the morning of 2nd February is the statement of Mr. Eddis as to what Ohn Ghine admitted to him in the tiffin interval. Ohn Ghine is about as shifty a witness as the other members of his family whose evidence has been already commented on and disbelieved. Since his interview with Mr. Eddis on the 2nd February he has denied that the hint to which he referred was a hint to bribe, and says that it was a hint to watch Hardless. We believe that the account given by Mr. Eddis of the conversation that occurred between him and Ohn Ghine in the tiffin interval is substantially correct. If the whole of that conversation be considered it is quite clear that the word "hint" cannot possibly bear the construction that Ohn Ghine now places on it. Ohn Ghine was questioned by the Government Advocate on 19th February. He denied that there was no hint to bribe, and then said that Mr. Cowasjee had given him a hint to approach Hardless, but again said that there was no hint to bribe. When asked to relate the conversation that had passed between him and Mr. Cowasjee he said that Mr. Cowasjee asked him whether he knew Hardless, and again whether he had ever spoken to Hardless, and that Mr. Cowasjee had then said that there were rumours that the other side were bribing Hardless. This, he said, was the whole of the conversation. In this Court he denied that he had used the term "hint to approach." It may be remarked that the three statements that he admits were made at that interview are more consistent with the idea that he was being asked to bribe Hardless than with the idea that he was asked to watch him. But Ohn Ghine is a witness in whom we can place no reliance. If the evidence in the case is sufficient to prove that Mr. Cowasjee said to Mr. Eddis that he had asked Ohn Ghine to bribe Hardless, we will have no difficulty in coming to the conclusion that Ohn Ghine's statement to Mr. Eddis proves that Mr. Cowasjee actually did advise Ohn Ghine to bribe Hardless.

It has been urged that Mr. Hardless was an unimportant witness and that there would have been little use in bribing him. He was unimportant in the sense that if his evidence proved that the letters were forged it would only destroy a plank of the defence, and would not be conclusive as to the guilt of the persons charged with abduction. But it was of the utmost importance in the interests of the prosecution, because if it proved that the letters were genuine, it would have completely demolished the whole case for the prosecution.

It is suggested that throughout the abduction case Mr. Eddis was excited, and incapable of exercising a calm and sound judgment. We certainly think that Mr. Eddis erred in judgment in continuing to act with Mr. Cowasjee after he believed that Mr. Cowasjee had resorted

to malpractice. If the result of the trial had been a conviction instead of an acquittal, Mr. Eddis would have found that he had incurred a grave responsibility which left him in a very serious position. But we see no reason to doubt that Mr. Eddis' powers of memory and observation were unimpaired. We have no reason to doubt that he is a truthful witness, and we believe that the statement which he made to the Government Advocate, which has led to these proceedings, was made under a sense of duty, and that the duty, was an unwelcome and painful one to him.

The statements of Mr. Cowasjee which Mr. Eddis has related, *viz.*, (1) "The bargain is not yet completed," (2) "I have advised Ohn Ghine to bribe Hardless," or words to that effect, (3) "I have never advised a client to do so before, but in this case I thought it necessary," are statements which would naturally leave a vivid impression on his memory. If, as we believe, he is a truthful witness, it is difficult to see how these statements could be false in the sense of being mistaken.

The statement made to Mr. Eddis by Ohn Ghine, after Ohn Ghine had been informed that Mr. Cowasjee himself had said that he advised him to bribe Hardless, was, "Oh, Mr. Eddis, he only gave me a hint." This statement also must have strongly impressed Mr. Eddis, and we are unable to hold that there was any room for mistake as to its meaning.

Mr. Eddis receives corroboration from persons of undoubted respectability to whom he repeated the statements on the same day after the lapse of a few hours. It is quite clear that his evidence accords with the impressions that were on his mind on the day on which the events occurred.

The defence has given no consistent explanation of these incriminating circumstances. On the contrary, for reasons that have already been fully stated, the very strongest inference has been raised that the defence is false, and that it was concocted after the events.

It is urged that it is improbable that a barrister and an advocate of long standing, of much experience, and of great wealth, would commit professional and social suicide, by committing an act of gross misconduct, and immediately disclosing it to another advocate, as Mr. Cowasjee is alleged to have done. We admit the improbability, but we cannot escape the conviction that the evidence forces upon us.

We find that it is proved beyond reasonable doubt that Mr. Cowasjee on the 2nd February said to Mr. Eddis, "I have advised Ohn Ghine to bribe Hardless" or words to that effect, and also the words, "I have never advised a client to do so before, but I thought it necessary in this case," and that Mr. Cowasjee actually did what in these statements he admitted that he had done and advised Ohn Ghine to bribe Hardless.

We find that Mr. Cowasjee is guilty of gross professional misconduct as charged in the second charge. There can be no professional misconduct more gross than this. An advocate who is representing the Crown in a criminal trial, advises his client to bribe a witness in order to obtain a conviction. There is only one order that we can

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pass in such a case. We direct that Mr. Bomanjee Cowasjee be dismissed from his office as an advocate of this Court.

As Mr. Hardless has been frequently mentioned in these proceedings, we desire to add that there is not a word of evidence from which it can be inferred that a bribe was ever offered to him or that there is any stain on his character.

The appeal was heard *ex-parte*, and on the 14th November 1906 their Lordships of the Privy Council stated that they would advise His Majesty in Council to allow the appeal, and would give their reasons for doing so at a future date.

The judgment of their Lordships was delivered on the 14th December 1906 by—

December  
14th, 1906.

*Lord Davey.*—This is an Appeal from an Order, dated the 21st March 1906, of the Chief Court of Lower Burma, by which Order the Appellant was dismissed from his office as an advocate of the Court.

The Appellant was called to the Bar by the Honourable Society of Lincoln's Inn on 17th November 1891, having previously been admitted as an attorney of the Calcutta High Court in 1879, and from the year 1881 was an advocate of the Court of the Recorder of Rangoon until the establishment of the Chief Court of Lower Burma, and from that date he has been an advocate of the last-named Court.

On the 9th March 1906 the Appellant was served with an Order of the Chief Court whereby he was called upon to show cause why he should not be dismissed or suspended from his office as advocate of the Court in the event of two charges which had been framed by the Court, or either of them, being found to be true. These charges were as follows :—

1. That you, whilst employed as an advocate for the prosecution of Maung E Maung and others charged with having abducted Ma Nu, the daughter of Maung Ohn Ghine, C.I.E., and his wife, Mah Yeik, having been made aware that some letters had been received by members of Maung Ohn Ghine's family which purported to be Ma Nu's, advised the family to say nothing about such letters having been received, and designedly withheld from the police and from Mr. Eddis, the senior advocate conducting the prosecution, the fact that such letters had been received, and you were thereby guilty of gross professional misconduct.

2. That you, whilst the trial of the said Maung E Maung and others was proceeding at the First Criminal Sessions of this Court in this year, and when you were acting as one of the advocates for the prosecution, suggested or hinted to the said Maung Ohn Ghine that he should influence or attempt to influence Mr. Hardless, a professing expert in handwriting, by improper means, in order that Mr. Hardless might be induced to express opinions favourable to the prosecution's case in connection with certain letters produced during the course of the said case, and you were thereby guilty of gross professional misconduct.

The circumstances in which these charges came to be made against the Appellant were shortly as follows. The Appellant had been engaged as junior Counsel with another advocate (Mr. Eddis) to conduct the prosecution of certain persons charged with the abduction of a girl named Ma Nu, daughter of One Ohn Ghine, both in the Magistrate's Court and at the trial at a Criminal Sessions. Ohn Ghine was absent from Burma when the prosecution was commenced, and returned on the 17th August 1905, while the case was pending in the Magistrate's Court. A day or two previously some member of the

family informed the Appellant that letters purporting to come from Ma Nu had been received by her mother. And the Appellant said they would go into them on Ohn Ghine's arrival, which he was told was expected in two days. After his arrival the letters were at once handed to the Commissioner of Police. This was the substratum of fact on which the first charge was founded. During the trial in the Sessions Court, which took place in February 1906, certain other letters purporting to have been written by Ma Nu, which, if genuine, tended to show that the case was one of voluntary elopement and not abduction, were produced for the defence. Mr. Hardless, who is described in the judgment of the Chief Court as "the Government of India expert in 'handwriting,'" happened to be in Rangoon, and was asked by the Commissioner of Police to give evidence as to the genuineness of these letters. Ohn Ghine was under the impression (without, it should be said, the slightest apparent foundation) that Mr. Hardless had been or would be bribed by the other side, and more than once pressed his fears upon both Mr. Eddis and the Appellant. As they were going into Court on Friday, 2nd February, the Appellant said something to Mr. Eddis which conveyed to his mind the impression that the Appellant had advised Ohn Ghine to bribe Mr. Hardless. Mr. Eddis did not profess to remember the words used by the Appellant, but was certain that the Appellant went on to say that he had never advised a client to do such a thing before, but in this case he thought it necessary. This hurried conversation was the foundation of the second charge.

The learned Judges held that it had not been proved that the Appellant was guilty of the first charge. The evidence given in support of this charge is not directly material on the second charge, but it is not unimportant as showing a certain inexactness in Mr. Eddis' memory of spoken words, and a tendency in his mind to give a colour to words used in conversation which they do not necessarily bear. For example, Mr. Eddis stated in his evidence that he told Mr. McDonnell, the Commissioner of Police, that "Cawasjee had known about the letters all the time," and this was confirmed by Mr. McDonnell. But Mr. Eddis admitted that he had not asked the Appellant how long he had known about them, and made no inquiries from him at all at any time as to when he got them. And the fact (as proved) was that the Appellant had known of the existence of the letters only two days before they were produced.

On the second charge Mr. Eddis was corroborated by Mr. Lentaigne, his partner, Mr. Clifton, an assistant in his office, and Mr. McDonnell, who severally stated that Mr. Eddis had on the same day repeated to them his impression of the effect of his conversation with the Appellant. This evidence was admissible under the Indian Evidence Act (Section 157), but it only tends to support the credibility of Mr. Eddis, and does not carry the matter any further on the real issue, whether the Appellant did in fact advise Ohn Ghine to bribe Mr. Hardless.

The Appellant's story is thus stated in his evidence-in-Chief :—

I never had any conversation with Mr. Eddis in the Bar Library with regard to bribing Mr. Hardless. I had conversation with him in his own chambers, and

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also in the corridor of this Court with regard to Hardless. Mr. McDonnell was then standing with his hand on the railing of the passage leading to the lavatory. The conversation in Mr. Eddis' chambers was on the previous day. In his chamber I told Mr. Eddis that Ohn Ghine told me that the defence were trying to bribe Hardless, and that Ohn Ghine wanted me to get the Commissioner of Police to set a watch on Hardless, and that I had told Ohn Ghine that this was impossible for me to do unless there was some tangible proof of attempts being made by the defence. I did not on that occasion say anything to the effect that I would advise Ohn Ghine to bribe Hardless. Mr. Eddis told me on that occasion that Ohn Ghine had also spoken to him on the subject. From what has transpired in Court during this inquiry, I am inclined to think the conversation in the corridor was on the Friday. When I wrote my explanation I was in doubt whether it was on the Friday or on the Monday. When I came to Court that day I met Ohn Ghine, who told me that we had done nothing in the matter, and Hardless had been got over and was going to give evidence against the prosecution. I said I did not believe it. He insisted that this information was reliable. Before that I had told him that if the bribery had taken place he would not have the means of knowing it. When he insisted I lost my temper to a certain extent, and said that 'if the other said could have done that, you could have done it too.' I then went and got my gown and went downstairs to the original Civil Court, where I had something to do. When I came up I met Mr. Eddis at the top of the stairs as he was coming out of the Bar Library, and I told him all that had happened between me and Ohn Ghine. While we were finishing the conversation the Court gong sounded and we both went to the Sessions Court. When I was talking to Ohn Ghine in the corridor before going downstairs I did not see either Mr. Eddis or Mr. McDonnell nearby. I spoke to Ohn Ghine near the Jury room. I did not take Mr. Eddis aside. I spoke to him as one advocate would speak to another about a delicate matter. I never on that occasion or at any time said to Mr. Eddis that I had never done such a thing before, but I had advised Ohn Ghine to bribe Hardless, as I thought in that case it was necessary. In the Sessions Court Mr. Eddis said to me, 'This is a serious matter. You ought to speak to Maung Ohn Ghine and tell him that there ought to be nothing of the kind in this case.' I laughed and said, 'Maung Ohn Ghine is not such a fool as to misunderstand me.' That was all that passed between me and Mr. Eddis on that occasion. I never heard anything more about the matter until Mr. Giles spoke to me on the 27th February. Mr. Eddis never referred to the matter again in my hearing. I have no recollection of having used the words, 'The Bargain is not yet closed or completed.' I could not have used such words, because my information was definite that Hardless had been bribed, and that he was going to give evidence against the prosecution. Ohn Ghine told me definitely that Hardless had been bribed, and he insisted that his information was reliable.

Mr. Eddis' account of the conversation in Court was as follows :—

When we got into Court I said that nothing of the kind he has just told me could possibly be allowed, and he must tell Ohn Ghine so. The case was then going on, into the best of my knowledge I was standing up examining a witness. He made no reply.

It is, of course, quite possible that under these circumstances, when Mr. Eddis' attention was engrossed in the examination of a witness, he may not have heard the Appellant's reply, or it may have failed to attract his attention.

The occasion and supposed effect of the statement alleged to have been made by the Appellant that "the bargain is not yet completed," is veiled in some obscurity. It is put by McDonnell in a previous conversation between the Appellant, Mr. Eddis, and himself on the same morning, Friday, the 2nd February, and that is confirmed by Mr. Eddis in his examination-in-chief.

There was a rumour flying about that Hardless' evidence would be in favour of the defence, and I cannot purport to give the whole of what occurred, but Cowasjee said, if that was so, Hardless must have been bribed, and then went on to use these words, 'The bargain, however, is not yet completed.'

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In his cross-examination he enlarges the statement into "The bargain is not yet completed." I do not say that Hardless is bribed; "the bargain is not complete." The Appellant denies having made the statement at any time. No very definite meaning can be attached to the words, which, however, appear to refer to the apprehended action of Ohn Ghine's opponents. And their Lordships do not attach any weight to them for the present purpose.

The Government Advocate in support of the case against the Appellant called Ohn Ghine. After a few questions, the answers to which the learned Counsel considered unsatisfactory, he obtained leave to treat Ohn Ghine as a hostile witness and cross-examine him. But no admission was elicited from the witness that the Appellant had advised him to bribe Hardless, and in fact he explicitly denied it. The Court expressed the opinion that Ohn Ghine was a witness in whom they could place no reliance.

Even before Ohn Ghine's examination, when there was no question of discrediting him, Mr. Eddis, in answer to questions from the Chief Judge, had stated the particulars of interviews he had with Ohn Ghine in the absence of Appellant, and repeated statements then made to him by Ohn Ghine. And after Ohn Ghine had been examined, the Government Advocate went himself into the witness-box and was allowed to state the particulars of a long conversation between Ohn Ghine and himself. The learned Judges in their judgment say:—

The only reliable evidence as to what Mr. Cowasjee said to Ohn Ghine in the corridor on the morning of 2nd February is the statement of Mr. Eddis as to what Ohn Ghine admitted to him in the tiffin interval.

Their Lordships are of opinion that the evidence given by Mr. Eddis and by the Government Advocate was inadmissible for the purpose for which it was used, or as against the Appellant. Even if it was admissible for the purpose of impeaching the credit of the witness under Section 155 (3) of the Indian Evidence Act, what would it prove? It might prove that Ohn Ghine was an unreliable witness who said one thing one day and another thing another day, and tend to discredit his sworn statement, but it would not prove the truth of his unsworn statement or make it evidence against a third person. Ohn Ghine was questioned by the Government Advocate as to what he had said to Mr. Eddis, but he adhered to his statement that "the hint" of which Mr. Eddis had spoken was a hint to have Mr. Hardless watched, and that the Appellant had never advised him or hinted to him to have Mr. Hardless bribed. It appears that he did in fact take measures to have Hardless watched. Their Lordships are disposed to agree that Ohn Ghine's evidence cannot be implicitly relied on. On the other hand, they cannot accept Mr. Eddis' statement of his conversation with Ohn Ghine as admissible evidence against the Appellant. But, in saying so, they think it fair to the Appellant to say that the words attributed to Ohn Ghine by Mr. Eddis appear to



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them capable of a different construction from that put upon them by the learned Judges.

There is, therefore, no direct evidence that the Appellant in fact advised Ohn Ghine to attempt to bribe Hardless, and the only evidence in support of the second charge against the Appellant which has to be considered is Mr. Eddis' report of (1) a hurried conversation lasting some half minute, as to the greater part of which he cannot remember the words used, and as to the rest of which the words deposed to are innocent or otherwise according to the context, and (2) a whispered conversation between two barristers in Court, whilst one of them was on his legs examining a witness. Their Lordships are of opinion that such evidence is quite insufficient to support the grave charge made against the Appellant.

In a case of this kind it is permissible for Judges of fact to consider the probabilities. It is improbable that a man of the Appellant's experience could suppose that a witness like Mr. Hardless was amenable to be bribed to give false testimony, or not have known that any attempt to influence him in that way would recoil on him who made it. It is yet more improbable that a man in the Appellant's professional position would imperil his whole future in such a manner or for such a purpose. And it is almost impossible to believe that if he did so he would at once go and tell it to a leading European Advocate, and that too in a public place where he might be overheard.

Mr. Eddis does not seem at first to have taken so serious a view of the matter as he afterwards did. His continuing to conduct the abduction case with the Appellant may be explained by his unwillingness to inflict an injury on his client, but it is difficult to understand why, believing all he did about the Appellant, he appeared in another case with him as his leader on the following 23rd February.

For these reasons their Lordships thought it their duty, as they stated on the 14th November, humbly to advise His Majesty that the Order appealed from be reversed, and that the Appellant, Mr. Bomanjee Cowasjee, be restored to his office as an advocate of the Chief Court of Lower Burma, as from the 21st March 1906. The Appellant very properly does not ask for any costs of this Appeal.

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August 30th,  
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*Before Mr. Justice Hartnoll.*

HAJEE GOYA KAKA v. S. A. ZACCHEUS AND TWO OTHERS.

*Bagram—for appellant (plaintiff).*

*Lambert—for 1st and 3rd respondents (defendants).*

*Execution sale, Suit to set aside—Effect of confirmation of execution sale—Limitation Act, Schedule II, Article 12 (a)—Code of Civil Procedure, s. 312.*

A sale in execution of a decree does not affect the right, title and interest in the property sold of persons other than the judgment-debtor.

Article 12, clause (a), of the Second Schedule of the Limitation Act only refers to suits by persons who are bound by the confirmation of the sale under section 312 of the Code of Civil Procedure, and not to suits by persons other than the purchaser or the parties to the suit in execution of the decree of which the sale was held.

*Lalchand Ambaidas v. Sakharam*, (1868) Bom. H.C. Rep., A.C.J., 139; *Parck's Ranchor v. Bai Vakhat*, (1186) I.L.R. 11 Bom., 119; *Vishnu Keshav v. Ramchandra Bhaskar*, (1886) I.L.R. 11 Bom., 130; *Kadar Hussain v. Hussain Sahib*, (1895) I.L.R. 20 Mad., 118; followed.

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In Civil Regular No. 15 of 1902 of the Court of the Subdivisional Judge, Toungoo, S.A. Zaccheus sued Kateiza Bi, Ma Bibi, Fatima Bi, Alima Bi and Mahomed Kooty to recover Rs. 755, and obtained a decree against all the defendants except Alima Bi. In execution of that decree he applied for the attachment of a certain house—No. 45 in Merchant Street, Toungoo—and wrote 'defendants being sharers in the joint property as heirs of Fakeer Kaka deceased.' The Subdivisional Judge ordered the house to be attached to the extent of the interests therein held by the judgment-debtors, and subsequently ordered the shares of the judgment-debtors in the attached property to be sold.

The present suit was brought by one Hajee Goya Kaka against Zaccheus, Kishnappa Chetty, Moss, Kateiza Bi, Ma Bibi, Phattoo, who appears to be the Fatima Bi of the former suit, and Mahomed Kooty, and in the plaint he states that the house No. 45 attached in the former litigation belonged to himself and nine others, including Kateiza Bi, Ma Bibi, Fatima Bi, and Mahomed Kooty, that by mistake the bailiff sold the whole house to Kishnappa Chetty instead of the respective interests therein of the judgment-debtors in the former suit, and that Moss bought it from Kishnappa Chetty. He therefore asks for a declaratory decree that only the right, title and interest of Ma Bibi, Fatima Bi and Mahomed Kooty in the said house was sold in the execution proceedings and not the entire house. He also asks for other relief that it is unnecessary to set out for the purpose of deciding this appeal. The Subdivisional judge gave the plaintiff a decree against which an appeal was filed in the Court of the Divisional Judge. The Divisional Judge allowed the appeal and dismissed the suit on the ground that it was barred by limitation under Article 12 of the Second Schedule of the Limitation Act.

Against this decision a second appeal has been laid in this Court on the following grounds—

- (1) for that the lower Appellate Court erred in law in holding that the said suit was barred under Article 12 of the Limitation Act;
- (2) for that the lower Appellate Court further erred in law in holding that the suit was to set aside a sale within the meaning of the said article.

It seems to me that the decision of the learned Divisional Judge was erroneous, and that Article 12 of the Second Schedule of the Limitation Act does not apply to this case. A sale in execution of decree can only deal with and pass the right, title and interest of the judgment-debtor, and it cannot pass the right, title and interest of others than the judgment-debtor. Section 312 of the Civil Procedure Code states that the Court confirming the sale confirms it as regards the parties to the suit and the purchaser. In this case it is alleged that the cause of action arose when the bailiff sold the whole house and not only the right, title and interest of the judgment-debtors in it.



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The other heirs, whose behalf Hajee Goya Kaka is now suing in his representative capacity as executor under his father's will, were not parties to the suit brought by Zaccheus, and so are not persons who would be bound by the sale, if the present suit had not been brought. In the case of *Lalchand Ambaidas v. Sakharam* (1) it was said: "Clause (3) of section 1 of Act XIV of 1859 is in terms applicable only to suits to set aside the sale, and the concluding words appear to show that it is to be construed strictly. They are 'the period of one year from the date at which the sale was confirmed or would otherwise have become final and conclusive, if no such suit had been brought.' These words are inapplicable to a suit where dispossession is the cause of action and it may not have taken place till some time after the sale was confirmed. They seem to refer to a suit by a party to the suit in which the execution issued, or by the purchaser, who are bound by the confirmation of the sale, and not to a suit by a person not bound by it." The rule in Article 12, clause (a), of the Second Schedule of the present Limitation Act is the same as in clause (3) of section I of Act XIV of 1859. In the case of *Parakh Ranchor v. Bai Vakhat* (2) and *Vishnu Keshav v. Ramchandra Bhaskar* (3) the same view is taken; and again in the case of *Kadar Hussain v. Hussain Saheb* (4)—a Full Bench case—it was held that Article 12(a) is not applicable to a case in which dispossession is the cause of action and in which the plaintiff was not a party to, or bound by the sale, and accordingly that a suit brought in 1892 to recover possession of the plaintiff's share of land sold by mistake in execution of a decree against his uncle in 1881 was not barred by limitation. In that case the learned Judges remarked:—

Whatever was the intention of the parties who took part in the execution sale, that transaction could not affect the title of the plaintiff, and therefore it was not necessary for him to have the sale set aside.

I accordingly hold in the present case that, as the heirs of Hajee Fakeer Kaka other than the judgment-debtors in the suit in the execution proceedings relating to which the house was alleged to be sold were not parties to that suit, and are not bound by that sale, this suit is not barred by Article 12 (a) of the Second Schedule of the Limitation Act.

I accordingly reverse the decree of the Divisional Judge, and as the appeal was decided on a preliminary point remand it back and direct that the Divisional Judge do re-admit the appeal and proceed to determine it on its merits, costs to follow the final result.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. HEIN KWAING.

*Revival of prosecution in revision—Further inquiry—Completion of revived proceedings—Criminal Procedure Code, s. 437.*

When a prosecution is revived by an order in revision under section 437, Criminal Procedure Code, the trial must be brought to a conclusion by the Magistrate holding the revived inquiry in the same way as if the case had been originally instituted before him.

(1) (1886) Bom. H.C. Rep., A.C.J., 139.

(2) (1886) I.L.R. 11 Bom., 119.

(3) (1886) I.L.R., 11 Bom., 130.

(4) (1895) I.L.R. 20 Mad., 118.

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*Queen-Empress v. Papadu*, (1884) I.L.R. 7 Mad., 454, followed.

The District Magistrate's order of reference is not complete. He says that the Township Magistrate of the second class discharged the accused, but that in his opinion the offence was conclusively proved, and he recommended that the accused be convicted and sentenced to six months' imprisonment.

If this were a complete and correct statement of the facts the reply would be :—

(a) It would not be legal to convict the accused, as he has never been charged.

(b) The District Magistrate is in error in referring the case to this Court, as he has power to take sufficient action himself under section 437 of the Code of Criminal Procedure.

On referring to the record, however, I find that on 30th August the then District Magistrate did take action under section 437. He directed the Magistrate to frame a charge and call on the accused to enter on his defence, to record the evidence of such witnesses as accused called, and then to return the record to the District Magistrate. The Township Magistrate having been transferred and succeeded by a Magistrate of the third class, the District Magistrate's orders were carried out by the Subdivisional Magistrate.

The District Magistrate's orders were correct, except the last part. He was wrong in directing the Magistrate to return the record to him. In *Queen-Empress v. Papadu* (1), it was held that a prosecution lawfully revived must be dealt with in accordance with law in the same way in which a prosecution originally instituted is dealt with. I agree with that, and so far as my experience goes it has never hitherto been doubted in this province that such is the meaning of the law. When a Magistrate is ordered to make further inquiry into the case of an accused person who has been discharged he must either charge the accused or discharge him again. If he charges him he must proceed to either acquit or convict.

I set aside so much of the District Magistrate's order as directs that the record be returned to him, and I direct that the record be returned to the Subdivisional Magistrate, who will proceed to dispose of the case in accordance with law.

Before Sir Charles Fox, Chief Judge.

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2. TUN PE.  
3. PAW THIT.  
4. THA SAING.  
5. PO MYA.

Criminal  
Revision  
No. 99B of  
1907.

April 30th,  
1907.

*Pwè—Music and dancing—Anyein-Pwè—Lower Burma Village Act, s. 13A.*

The accused held an entertainment described as an *anyein-pwè*, at which two of the village girls danced and music was played.

*Held*,—that in the absence of a special notification under clause (3), such an entertainment is not a *pwè* within the meaning of section 13A of the Lower Burma Village Act, 1889, as amended by Burma Act II of 1904.

(1) (1884) I.L.R. 7 Mad., 454.

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NGA PYU.  
—

The accused have been convicted of holding a *pwè* in a village without a license. In the police report the *pwè* is described as an *anyein-pwè*. The accused said that two of the village girls danced and music was played, but it was not a big *anyein-pwè*. The latest indication of what the Legislature means by the term *pwè* shows that the above description of entertainment was not intended to be restricted, unless the Local Government finds it necessary to bring them under control.

Under the amendment of the Act "*pwè*" ordinarily means a puppet-show or dramatic performance, or a native cart, pony, boat or other like race held for public entertainment whether on public or private property.

The Local Government has not declared an assembly of villagers at which there is music and two of the village girls dance to be a *pwè* under the Act, consequently the accused were not liable to be convicted.

The convictions and sentences are set aside, and the accused are acquitted.

The fines paid will be refunded.

Criminal  
Revision  
No. 74A of  
1907.  
—  
March 11th,  
1907.  
—

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. PO NAN.

*Order of municipal Committee—Fine for continuing disobedience of order after conviction—Authorization of Municipal employee to make complaint—Form of complaint.—Burma Municipal Act, 1898, ss. 180 (1), 195.*

Accused was ordered under section 130 of the Burma Municipal Act to vacate the house he occupied. The order not being complied with, he was prosecuted under section 180 (1), convicted, and sentenced to pay fine. He was also ordered by the Magistrate to move out within five days, failing which he was to pay a fine of Rs. 5 for every additional day of disobedience.

*Held*,—that the Magistrate had no authority to modify the order of the Municipal Committee by allowing the accused to disregard it for five days.

*Held ; also*,—that the Magistrate had no power to inflict a fine contingent on future events. In the event of the disobedience of the order continuing after the date of the conviction, the proper course would be for the Committee to prosecute the accused again. If convicted, he could then be fined Rs. 5 for every day the disobedience had continued, down to the date of the second conviction.

A complaint of an offence under the Municipal Act must be made by the Committee or by some person authorized by the Committee. Form at foot of complaint considered.

The Nyaunglebin Town Committee on 29th November served a notice on Po Nan directing him under section 130 of the Municipal Act to vacate the house he occupied within 48 hours, and not to occupy it again until it was put into a sanitary condition.

The order was not obeyed. Po Nan was prosecuted and convicted under section 180 (1) of the Act on 15th December 1906. The sentence is in these words, "Accused will pay a fine of Rs. 15 or suffer two months' simple imprisonment. He will move out in five days. Failing to do so by the 20th instant he will pay Rs. 5 every day for non-compliance."

The orders to move in five days and to pay Rs. 5 per day are in my opinion illegal. I can find nothing in the Act authorising the Magistrate to make such orders. The notice issued by the Committee was not

superseded by the conviction. It remained in full force, yet the Magistrate's order purported to modify it by permitting the accused to disregard it for five days. The Magistrate had no authority to limit it in this way.

Again, the Magistrate had no authority to inflict a fine contingent on future events. The words of the section are, "in case of a continuing breach, with a further fine which may extend to five rupees for every day after the date of first conviction on which the offender is proved to have persisted in the offence." In the present prosecution the Magistrate was *functus officio* when he realized the fine of Rs. 15. If the disobedience continued after that date the Committee could institute a fresh prosecution. In that prosecution the previous conviction (in the present case) should first be proved or admitted. Then the continuance of the disobedience should be proved or admitted. Then the Magistrate could inflict a fine not exceeding Rs. 5 per day, from 16th December (not merely from 21st December as ordered by the Magistrate) down to the last day on which the disobedience had continued at the date of the second conviction.

I set aside the Magistrate's order to move in five days, and his order to pay Rs. 5 per day for continuance of the disobedience.

The prosecution was instituted on a printed form of complaint, which has these words printed at the foot :—

By order,

Prosecution sanctioned.

Municipal Prosecutor.

President,

Nyaunglebin Town Committee.

This is a bad form, and seems to me to be likely to lead to illegalities. Chapter IX of the Act contains nothing about sanction to prosecutions, but section 195 enacts that the complaint must be made by the Committee or by some person authorized by the Committee. In this case the Secretary, Mr. Morrow, signed the complaint as prosecutor, and presented it to the Magistrate. If Mr. Morrow was duly authorized in writing to prosecute for offences of this class, the President's sanction to the complaint was superfluous. If Mr. Morrow was not so duly authorized, the Magistrate acted illegally in accepting the complaint, and the President's sanction made no difference in this respect. The best form for the foot of a complaint would be—

"Prosecutor authorized by the... Municipal Committee by resolution dated.....to prosecute for offences under section.....of the Burma Municipal Act."

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. PO SHIN.

*Fabricating false Evidence—False entry or statement—Intention—Authorized signature for another—Indian Penal Code, s. 192.*

A petition praying that a fishery lease might be transferred from A to B, and purporting to be signed by A and B, was presented to the Deputy Commissioner by

1905.  
KING-  
EMPEROR  
v.  
PO SHIN.

Criminal  
Revision  
No. 1266 of  
1906.

December  
31st, 1906.

1906.

KING-  
EMPEROR.  
v.  
PO SHIN.

A. B was not present but his son was, and admitted having signed his father's name. He was subsequently prosecuted, although no attempt was made to show that he had acted fraudulently and without his father's authority, and was convicted of fabricating false evidence under section 192, Indian Penal Code.

*Held*,—that the conviction was bad, because (1) the writing of B's name by his son did not, under the circumstances, constitute a false entry or a false statement, and (2) there was no intention that it should appear in evidence in any proceeding.

One Po Kin presented to the Deputy Commissioner a petition praying that a lease of a fishery which he had purchased might be transferred to Shwe Wa. The petition purported to be signed by Po Kin and Shwe Wa. The Deputy Commissioner asked where Shwe Wa was, when accused came forward and said he was Shwe Wa's son and had signed his father's name. The Deputy Commissioner made an oral complaint to a Magistrate, and the accused was convicted of fabricating false evidence, and a nominal punishment was inflicted.

In my opinion no such offence was committed, because—

- (1) the petition does not contain a false statement, and
- (2) there was no intention that it should appear in evidence in any proceeding.

As to (1), the document might be a false document within the meaning of section 464, Penal Code, if accused had written his father's name fraudulently or dishonestly, but there is no suggestion that he acted fraudulently, and that is probably why he was not prosecuted for forgery. He said he had his father's authority to sign, and this was not disputed by the prosecution. I think it is contrary to the natural meaning of section 192 of the Penal Code to say that Shwe Wa's name written by his son is a false statement or false entry.

As to (2), the writing of the name is causing a circumstance to exist, and doing so would amount to fabricating false evidence if the writer intended that the fact of the name being at the foot of the petition should appear in evidence in a proceeding taken by law before a public servant as such, and so appearing should cause such public servant to entertain an erroneous opinion touching any point material to the result of the proceeding. It is conceivable that the Deputy Commissioner might have taken evidence on the petition of Po Kin, but the petition itself can in no sense be called evidence.

I therefore set aside the conviction and sentence.

*Before Mr Justice Hartnoll.*

KING-EMPEROR v. {

1. PO TWE.
2. PO CHIT.
3. PO KYAW.
5. PO THEIN.

*Criminal  
Revision  
No. 1146 of  
1906.*

*September  
20th, 1906.*

*Security proceedings—Preventive sections—Habitual offender—Joint inquiry—  
Misjoinder—Criminal Procedure Code, ss. 110, 117 (4).*

The question whether a man is a habitual thief is a matter personal to one individual alone, and such questions in respect of more than one person should not be dealt with in the same inquiry. Section 117, sub-section (4) of the Code of Criminal Procedure refers to cases such as those of persons who have been associated in an act rendering them liable to proceedings under section 107 or 108 of the Code of Criminal Procedure, where the matter under enquiry is not one solely

applicable or personal to one individual, and is not applicable to proceedings under section 110.

The four men were sent up on four separate charge sheets by the police, and the Magistrate joined the enquiries together into one. The four men were charged with being by habit thieves, and in my opinion section 117 (4) of the Criminal Procedure Code does not apply to such a case. The matter under enquiry with regard to each man is whether he is an habitual thief or not, and not whether another man is an habitual thief or not, or whether another man has been associated with him in thieving. I can imagine men charged with being by habit thieves being seriously prejudiced by their cases being taken together. The question of whether a man is an habitual thief or not is a matter personal to himself and forms a matter separate by itself.

Section 117 (4) of the Code of Criminal Procedure would seem to refer to such cases as where several persons are charged with being concerned in a wrongful act that may probably occasion a breach of the peace (section 107, Criminal Procedure Code), or in an act regarding the dissemination of seditious matter (section 101, Criminal Procedure Code). In such cases the matter under enquiry would be the act likely to occasion a breach of the peace, or the dissemination of seditious matter, and the matter is not one solely applicable or personal to one individual—that is, as to whether a man is an habitual thief or not.

\* \* \* \*

*Before Mr. Justice Irwin, C.S.I.*

KING-EMPEROR v. {  
1. PO WA.  
2. MA MYIT.  
3. PO YON.  
4. THA LAN.  
5. TWE YA.  
6. PO CHEIN.  
7. PO THAW.

1906.  
KING-  
EMPEROR  
v.  
PO TWE.

*Criminal  
Revision  
No. 996 of  
1906.  
December  
28th, 1906.*

*Gambling in a public place, Person conducting—Daing, Conviction of—Burma Gambling Act, ss. 10, 12.*

A "daing" can only be convicted of an offence under section 12, Burma Gambling Act, when the gambling he conducts is punishable under section 11. A person conducting gambling in a place to which the public have access is only punishable, like the players, under section 10, Burma Gambling Act.

*King-Emperor v. Nga Net and others, (1905) U.B.R., Gambling, 1, followed.*

The formal finding is that it is proved on the seven accused as stated in the charge, according to sections 10 and 12 of the Gaming Act. Then sentence was passed on Nga Po Wa under section 12, and on the others without specifying any section. The finding plainly does not comply with the provisions of section 367 (2) of the Code of Criminal Procedure. Turning to the proceedings under section 242, I find that the charge was that in a garden behind Ngaputaw village the first and second accused acted as *daings* while the other accused played cards for money.

The Magistrate did not state in any part of the judgment whether the garden was a common gaming-house or a place to which the public

1906  
KING  
EMPEROR  
v.  
Po WA.

have access. He never considered the point at all. If it was a common gaming-house, the persons who played cards for money in it ought to have been convicted under section 11, not section 10. If it was a place to which the public have access, the *daing* ought to have been convicted under section 10, not section 12. This is the view I expressed in *King-Emperor v. Nga Net*,\* and I see no reason to alter it.

As several months have elapsed since the sentences were passed I see no need to make any formal alterations in the convictions.

\* (1905) U.B.R., Gambling, 1.—Card-gambling and cock-fighting were carried on under a tamarind tree near the village. Most of the accused were convicted of gambling and setting animals to fight in a public place, under section 10. Nga Net and Nga Po Ye were convicted on the same facts, with the additional fact that they acted as *daings*, and this was held to be an offence under section 12. According to the police report Nga Net was the *kyet daing* and Po Ye the *pé daing*.

In the finding the words of section 12 are not used, as they ought to be, nor was the definition of common gaming-house referred to. The Magistrate ought to have carefully considered whether such a place as is described in the judgment can, under the circumstances described, be held to be a common gaming-house.

Under section 3 a "common gaming-house" includes a public place in which any instruments of gaming are kept or used for the profit or gain of the persons using such place. The expression "instruments of gaming" is defined in subsection (3), and does not include birds or animals. The decision in this case turns on the meaning of the word "public" in section 3 (1). In the expression "owing, occupying, using or keeping," I think the four verbs must be construed as *ejusdem generis*, and, if so, none of them can apply to a place which is public in the sense that the person charged with using it has no right of use which differs from the right of the public in general. There are many other places which are public in the ordinary meaning of the word, e.g., a theatre, a Railway station, and a Court of law. I would say therefore that the "using" in section 3, and the expression "having the use of" in section 12, denotes something different from the using of the public at large who resort to the place. The "using" in the second line of section 3 (1), clause (a), must be a general using of distinct from the special using mentioned in the previous line, which converts the place into a common gaming-house.

Moreover, in this case the Magistrate made no distinction between the *kyet daing* and the *pé daing*. Even if the possession of cards could convert the space under the tamarind tree into a common gaming-house, the possession of cocks could not, because birds and animals are not mentioned in section 3 (3). This confirms the construction I have placed on the definition of "public," as it can hardly be supposed that the Legislature intended that the person who organizes offences under clause (a) of section 10 for his own profit should be punishable under section 12, while a person who organizes offences under the other clauses of section 10 is not so punishable.

Taking a comprehensive view of the Act, sections 11 and 12 relate to offences committed in a common gaming-house, section 10 to offences committed in a public place. Without going the length of saying that offences under sections 10 and 12 cannot be committed at the same time in the same place, I think it may safely be said that the primary object of the Legislature was not to make the conductor of gambling in a public place punishable under section 12.

In *Po Tun v. King-Emperor*, U.B.R., 1897—1901, 217, my learned predecessor held that the promoters and organizers of gambling on a threshing-floor should be convicted under section 10, not section 12, though the threshing-floor was only a private place to which the public had access, not a public place in the same sense as a public street or the space under a tamarind tree outside the village in the present case.

I therefore alter the conviction of Nga Net and Po Ye to section 10. The sentences are confirmed.



Before the Hon'ble C. E. Fox, Officiating Chief Judge, and  
Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. YENA.

Criminal  
Revision  
No. 439 of  
1906.

Order of Appellate Court made without jurisdiction—Void proceedings—Code of Criminal Procedure, s. 530—Duty of High Court in revision. July 17th, 1906.

The accused was convicted of an offence under the Burma Municipal Act and sentenced to pay a fine of Rs. 20 by a first class Magistrate. He applied for revision to the Sessions Judge, who treated the application as an appeal and reversed the conviction, although no appeal lay and the order was not one that he could have passed in revision.

*Held*,—that as the Sessions Judge was not authorized by law to try the appeal, his order was void, but

*Held further*,—that an order which is void for want of jurisdiction must nevertheless be regarded as valid unless and until it is set aside by a Court of competent jurisdiction.

*Held further*,—that it is not imperative on the High Court to set aside in every case an order of acquittal or discharge made on appeal by a Court without jurisdiction.

*Queen-Empress v. Husein Gaibu*, (1884), I.L.R. 8 Bom., 307; *Empress v. Alim Mundle*, (1882) 11 C.L.R., 55; dissented from.

*Queen-Empress v. Po Thaing & others*, P.J., L.B., 188; *Queen v. Unnath Bundhoo Banerjee*, (1874) 21 W.R., 37; referred to.

The following reference was made to a Bench by Mr. Justice Hartnoll :—

In this case one Yena was convicted on the 26th February last by the Subdivisional Magistrate, Kawkareik, under section 154 of the Municipal Act, or in the alternative under section 154 of the Municipal Act coupled with section 110 of the Indian Penal Code, and fined Rs. 20. On revision Yena applied to the Sessions Judge with a view to having the order set aside and the fine refunded. The Sessions Judge on the 17th April last reversed the conviction and ordered the fine to be refunded. He subsequently found that, as the Subdivisional Magistrate had first class powers, no appeal lay and so he had no power to reverse the conviction. He has therefore now sent up the proceedings on revision stating that his orders were *ultra vires*, and with the recommendation that Magistrate's order be reversed.

The Sessions Judge's order of the 17th April amounts to an acquittal, though he had no power to acquit, as no appeal lay to him. The first point that arises is whether the order of the Sessions Judge is void for want of jurisdiction. If it is, this Court can now proceed to deal with the case in revision. If it is not, an order of acquittal in the case remains extant, and no action is required by this Court, unless an appeal be preferred by the Local Government against the order of acquittal passed by the Sessions Judge. In the case of *Queen-Empress v. Po Thaing and 4 others* (1) it was held that an order of a cognate nature was void and of no legal effect, as it was not an order of a Court of competent jurisdiction. I am not sure that this view is a correct one. The Code of Criminal Procedure in section 530 declares what proceedings are void, and an order of a Sessions Judge is not amongst them, as the section only refers to Magistrates. Under

(1) P.J., L.B., 188.



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KING-  
EMPEROR  
v.  
YENA.

section 417 of the Code the Local Government can appeal in appellate order of acquittal. As I cannot find any express provision of law declaring such an order of a Sessions Judge void, whereas section 530 of the Code does declare certain proceedings void, I am inclined to think that, though the Sessions Judge had no powers to acquit, nevertheless the acquittal proceedings are not void. The Local Government can appeal against the order if it thinks fit.

In view of the ruling referred to above I report the case for orders to the Chief Judge under paragraph 2 (3) of Notification No. 3, dated the 22nd January 1903.

*The opinion of the Bench was as follows :—*

The learned Sessions Judge dealt with a petition for revision as if it were an appeal, and reversed the conviction. He subsequently discovered his mistake, and submitted the proceedings to this Court for orders, as his order reversing the conviction was made without jurisdiction.

Chapter XLV of the Code of Criminal Procedure contains no provision for such a case. Section 530, however, is not exhaustive. No judicial officer can try an original case or an appeal unless he is empowered by law to do so. His authority is derived solely from the Legislature, and his appointment under the law provided by it. We think therefore that the order of the Sessions Judge in the case is void within the meaning of that term as used in section 530, Code of Criminal Procedure.

But an order which is void cannot be treated as a mere nullity so long as it has not been set aside. We cannot agree with that view of the law taken in *Queen-Empress v. Husein Gaibu* (2) and in *Empress v. Alim Mundle* (3). In *The Queen v. Unnath Bundhoo Banerjee* (4) the High Court thought it necessary to expressly quash a commitment made without jurisdiction. From a comparison of the language of section 530 with that of section 529, Code of Criminal Procedure, we think it may be inferred that the Legislature did not intend that a proceeding of a duly constituted Criminal Court, which is void for want of jurisdiction, should be treated as a nullity and disregarded, unless and until it is set aside by a Court of competent jurisdiction.

When an accused person is acquitted or discharged in appeal or revision by a Court which had no jurisdiction to make such an order, it is not imperative that this Court should in every case interfere. In the present case we see no special reason to interfere. The records may be returned.

*Before Mr. Justice Hartnoll.*

MAUNG KYAW v. THA DUN.

*Pennell*—for appellant (plaintiff). | *Dawson*—for respondent (defendant).

*Abusive and insulting language—Actionable wrong.*

The mere use of abusive and insulting language, not amounting to defamation and without proof of any special damage, is not actionable although it may, under certain circumstances, form a ground for criminal prosecution.

(2) (1884) I.L.R., 8 Bom., 307. | (3) (1882) 11 C.L.R., 55.  
(4) (1874) 21 W.R., 37.

Civil 2nd  
Appeal  
No. 54 of  
1906.

January  
17th, 1907.

*Girish Chunder Mitter v. Jatadhari Sadukhan*, (1899) I.L.R. 26 Cal., 653, followed.

*Nilmadhub Mookerjee v. Dookeeram Khottali*, (1874) 15 Ben. L.R., 161, referred to.

1907.

MAUNG  
KYAWv.  
THA DUN U.

Maung Kyaw sued Maung Tha Dun U for damages in that he abused him by the use of such words "ami yok tha, aba yok tha" (son of mean parents) "kweloma tha" (son of a dog) "ami lin" (husband of your mother) "wet tha" (son of a pig), and was awarded Rs. 50 damages by the Township Judge. On appeal by Maung Tha Dun U the District Judge reversed the judgment and decree of the Township Judge on the ground that abuse in the absence of the plaintiff was not actionable. Against this finding an appeal has been laid to this Court. The appellant by his counsel, Mr. Pennell, has argued before me that language of the kind used is actionable without proof of special damage.

The words used seem to me those of mere vulgar abuse, and no special damage to Maung Kyaw has been proved. They seem merely to have been insulting, and it is not proved that the plaintiff's reputation has been in any way affected by them. The leading case on the subject seems to be that of *Girish Chunder Mitter v. Jatadhari Sadukhan* (1), in which it was held that the mere use of abusive and insulting language, apart from defamation, is not actionable, irrespective of any special damage. The subject was gone into very fully in that case and my opinion coincides with that of the majority of the Bench. I would quote from it the following passage which occurs in the judgment of Sir Francis Maclean, C.J. :—

Apart then from authority, ought mere personal insult or abuse as distinct from defamation, and not touching the plaintiff's credit or reputation, to be actionable in this country, if it produces mental pain or distress? It has been urged that insult being punishable under the Penal Code, as it was under the old Hindu Penal system, it must be sufficient ground-work for a civil suit. But we think the assumption underlying this argument has no justification, for though the facts which go to make a penal offence may, in general, suffice to constitute a civil wrong, it requires no exhaustive examination of the forms of civil and criminal liability to show that the latter is no infallible guide to the former. This appears to us to be made clear by the very section of the Penal Code which prescribes a punishment for insult for the purpose of the penalty imposed is to prevent a breach of the peace.

Do then considerations of public policy demand that we should decide in favour of the proposition for which the appellant contends? We think not. If illustration were needed of the mischief to which such a decision would lead, it is furnished by this present case. For words of idle abuse uttered in the heat of excitement, incapable of touching the plaintiff's reputation or credit, the defendant has been prosecuted and punished in the Criminal Courts; and then, as though that were not enough, the plaintiff has sued him in the Civil Courts, carrying the case for that purpose through three separate Courts, though it has been found, as is obvious to any one, that the words used "did not affect the plaintiff's reputation a whit." Section 504 of the Penal Code provides a remedy, and that an ample remedy, for conduct such as that of the defendants; and in our opinion there is no principle of public policy which requires that, in addition, the party complaining should have a remedy by civil suit.

We would, therefore, answer the question embodied in the reference by expressing the view that abusive and insulting language, not amounting to defamation, is not actionable. Section 95 of the Penal Code indicates that harm of a trumpety

(1) (1899) I.L.R. 26 Cal., 653.

1907.

MAUNG

KYAW

v.

THA DUN U.

nature, *i.e.*, "so slight that no person of ordinary sense and temper would complain of it," is not to be treated as an offence. If mere vulgar abuse, uttered in a moment of anger, abuse to which no person of ordinary sense and temper would attach the slightest importance, is, if it cause mental distress, to afford a ground of action, it is lamentable to think to what an alarming extent the flood-gates of litigation would, in this country, become open. We are but little disposed to favour any such view. On the contrary we agree with the expression of opinion of Pontifex, J., in the case of *Nilmadhub Mookerjee v. Dookeeram Khottah* (2) that actions for verbal slander ought not to be encouraged.

My views being the same as those expressed in the above judgment, I therefore hold that the mere use of abusive and insulting language, apart from defamation, is not actionable, irrespective of any special damage. The remedy of the person aggrieved in the majority of such cases as the present one lies in the Criminal Courts and that seems to me to be a sufficiently deterrent check in the interests of the public. Moreover, there appears to me nothing repugnant to the principles of justice, equity and good conscience to render it necessary for a person claiming pecuniary compensation for verbal slander to prove that some damage has resulted to him from the words that are alleged to be slanderous.

The appeal is dismissed with costs.

Civil 2nd  
Appeal  
No. 46 of  
1906.

February  
13th, 1907.

Before Sir Charles Fox, Chief Judge.

MYAT THIN v. P. C. V. E. KASUVIS VANTHAN CHETTY.

A. C. Dhar—for appellant (3rd. defendant). | Villa—for respondent (plaintiff).

Unregistered mortgage bond with personal undertaking implied—Admissibility in evidence—Indian Registration Act, 1877, s. 49.

A mortgage bond containing a personal undertaking, whether express or merely implied, to repay money borrowed is admissible in evidence in a suit to enforce such personal obligation, even though the property mortgaged therein exceed Rs. 100 in value and though the bond be not registered.

*Ma Tha v. Ma Shwe Hnit*, (1894) P.J., L.B., 124, *Ulfatunnissa v. Hosann Khan*, (1883) I.L.R. 9 Cal., 520; *Thandavan v. Valliamma*, (1892) I.L.R. 15 Mad., 336; followed.

The grounds of appeal are to the effect that the unregistered mortgaged bond was wrongly admitted in evidence in support of the plaintiff's claim to a personal decree against the defendant.

It was argued that the case of *Ma Tha v. Ma Shwe Hnit* (3), relying on the decision in which the learned Divisional Judge held the document to be admissible in evidence in proof of the personal obligation to repay the debt, is distinguishable from the present case, because in this latter there is in the bond no express personal undertaking to repay the money borrowed.

The terms of the bond are to the following effect :—

The borrowers say to the lender : " We want to borrow a sum of Rs. 800 for 12 months with interest at the rate of Rs. 2-4 per cent. per mensem. Until the principal and interest are paid up in full we shall keep in mortgage two pieces of land (described). If we, on the expiry of the months fixed, fail to pay up the principal

(2) (1874) 15 Ben. L.R., 161 (166).

(3) (1894) P.J. L.B., 124.

and interest in full, and if we try to evade payment, you the creditor may do or take steps according to law, and take the said two pieces of mortgaged paddy land. We shall also calculate and pay interest for the months and days in excess of the fixed time." As proposed (by the borrowers) Rs. 800 is lent out and paid to them with interest at Rs. 2-4 per cent per mensem. Thus (the borrowers) agreeing execute this deed of agreement.

Although it may be said that there is in the above no express personal undertaking by the borrowers to repay the money borrowed with interest, there is undoubtedly an implied undertaking by them to do so. Moreover, the Full Bench ruling of the Calcutta High Court in *Ulfatunnissa v. Hosain Khan* (1), referred to in *Ma Tha v. Ma Shwe Hnit* (2), was not based upon the admissibility of a document depending upon whether the contract contained two obligations by the borrower, one affecting land and the other not. The ground of decision was that the words of section 49 of the Registration Act, "No document required by section 17 to be registered. . . shall be received as evidence of any transaction affecting such property," meant that no such document shall be received as evidence so far as it affects land.

I cannot find that this decision has been even questioned to any later decision at any other High Court. It was accepted as correct in *Thandavan v. Valliamma* (3) in which Subramanya Ayyar, J., said :—

The object of the law is obviously to prevent documents which ought to be, but are not, registered from affecting immovable property and moveable property only. There does not seem to be any warrant for supposing that, if a document relating to both immovable property and moveable property is not registered as required by law, then the document becomes wholly inoperative, not taking effect even as regards the moveable property comprised therein.

For the reasons stated in these decisions I think that the mortgage bond was admissible in evidence, although not registered, in the present suit, which was merely to enforce a personal obligation on the part of the defendants to repay the money borrowed with interest.

There is, as I have said, an implied undertaking by the borrowers to repay the money borrowed to be gathered from the terms of the bond.

For these reasons I think that the suit and appeal were rightly decided, and I dismiss the appeal with costs.

Before Mr. Justice Irwin, C.S.I.

NGA PYA, MAW TI AND PU LE v. KING-EMPEROR.

Fagan—for 3rd appellant, PU LE.

Appeal—illegal sentence—Sentence on reference by Subordinate Magistrate—Criminal Procedure Code, ss. 349, 408.

A District Magistrate to whom a case had been submitted by a second class Magistrate under section 349, Code of Criminal Procedure, passed a sentence of five years' imprisonment on one of the accused.

1907.

MYAT THIN  
v.

P.C.V.E.  
KASUVIS  
VANTHAN  
CHETTY.

Criminal  
Appeals  
Nos. 490,  
536 and 561  
of 1906.

December  
5th,  
1906.

(1) (1883) I.L.R. 9 Cal., 520. (2) (1894) P.J., L.B., 124.

(3) (1892) I.L.R. 15 Mad., 336.

1906.

NGA PYA  
v.  
KING-  
EMPEROR.

*Held*,—that in view of the last clause of section 349, Code of Criminal Procedure, a District Magistrate acting under this section must be regarded as a Magistrate not empowered under section 30, Code of Criminal Procedure, and that therefore, in spite of the sentence of five years' imprisonment, which was *ultra vires*, appeal lay not to the Chief Court, but to the Court of Session.

*Nga Po Saing v. Queen-Empress*, P. J. L.B., 516, referred to.

The three appellants were tried by a second class Magistrate, who found the offences proved and sent the accused to the District Magistrate under section 349 of the Code of Criminal Procedure. The District Magistrate sentenced Nga Maw Ti to one year, Nga Pya to five years, and Nga Pu Le to two years' imprisonment.

The sentence on Nga Pya is *ultra vires*, under the last clause of section 349. There is no question about this. The District Magistrate himself discovered his error some days after the sentence had been passed, and noted the fact on the diary.

Nga Pu Le appealed to the Court of Session. The learned Judge returned the appeal to be presented to this Court because one of the co-accused had been sentenced to more than four years' imprisonment—*Nga Pe Saing v. Queen-Empress* (1). The other two appellants appealed direct to this Court.

Nga Pu Le was represented at the hearing of the appeal by Mr. Fagan, who raises the preliminary objection that the appeal does not lie to this Court, but to the Court of Session, because the sentence of Nga Pya is *ultra vires*.

I think this contention must prevail. The appeal lies to the Court of Session unless proviso (b) of section 408 of the Code of Criminal Procedure applies, *viz.*, "when in any case a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, the appeal shall lie to the High Court."

The District Magistrate is empowered under section 30, and in consequence of being so empowered he can pass a sentence of five years' imprisonment under section 34, but he is barred by the terms of section 349 from doing so in the present case. Therefore for the purposes of the present case he must be regarded as a Magistrate not empowered under section 30.

The reason for proviso (b) of section 408 obviously is that when a long term of imprisonment has to be undergone the question whether the offence is proved should be tried in appeal by a Court of higher grade than it would be tried by if the sentence were less. In the present case this reason does not apply, because if the Appellate Court confirmed the conviction it would be obliged to reduce the sentence to one of not more than two years.

I therefore direct that all three appeals be returned, to be presented to the Sessions Judge.

(1) P.J., L.B., 516.

### Full Bench—(Civil Revision).

Before the Hon'ble Mr. C. E. Fox, Chief Judge, Mr. Justice Bigge,  
Mr. Justice Irwin, C.S.I. and Mr. Justice Hartnoll.

Civil  
Revision  
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{ 1. J. A. HARRISON.  
2. W. B. CRIZZLE.  
3. SYED MORTAZA.

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*Pennell*—in person (applicant-plaintiff).

*McDonnell*—for J. A. Harrison (respondent-defendant).

*No appearance*—for W. B. Crizzle (respondent-defendant).

*Bland*—for Syed Mortaza (respondent-defendant).

*P. C. Sen*, as *amicus curiæ*—representing Barristers.

*Capacity of a advocate to sue or be sued in connection with professional services—  
Barrister-at-law—General practitioner—Indian Contract Act, s. 11.*

A Barrister-at-law who has been admitted as an Advocate of the Chief Court and who combines the various functions performed by legal practitioners of very class in England must be considered to act in this country not in virtue of his membership of the English bar, but in virtue of his office as an Advocate. He is therefore capable of suing for fees for professional services and of being sued for negligence.

*The Land Mortgage Bank of India, Ltd. v. Elmes*, (1876) 25 W.R., 332, followed.

*Queen v. Doutre*, (1884) L.R. 9 A.C. 745; *C. Ross Alston v. Pitambar Das*, (1903) I.L.R. 25 All., 509; *Kennedy v. Brown*, (1863) 13 C.P., N.S., 677; referred to.

*Grey v. Diwan Lachman Das*, (1895) P.R., 919, dissented from.

*Fox, C.J.*—These three revision cases have been heard together, the same point being involved in each.

They are applications to revise the decisions of the Additional Judge of the Rangoon Small Cause Court dismissing three suits on the ground that the plaintiff or plaintiffs could not recover sums claimed by him and them, because he and they were Barristers-at-law, and being so they had no right of suit for recovery of sums claimed as fees for professional services rendered.

In suits C.R. Nos. 7637 and 7638 Mr. Pennell sued for sums which he claimed to be reasonable remuneration for professional services rendered in writing letters under the instructions of the defendants. In C.R. No. 7639 Mr. Pennell and Maung Thin, describing themselves as "carrying on business in Partnership as advocates under the style and firm of Pennell and Maung Thin," sue for the balance of fees which they allege the defendant promised to pay them for conducting on his behalf a suit in this Court to which he was a party. In the two first mentioned suits the plaintiff sued for remuneration for a description of professional work which according to the rules of the English Bar, to which he belongs, he is not permitted to undertake in England, but which as an advocate of this Court he is permitted to do. In the third suit the plaintiffs are Barristers-at-law, and as such are not in England permitted to enter into partnership with any one, but as advocates of this Court they are not forbidden to form a partnership, and to work professionally as partners.

The applications for revision are based on the contention that the learned Judge erred in law in dismissing the suits on the ground that

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an advocate of this Court is precluded from suing for his fees, if he is also a Barrister-at-law.

The question involved has been the subject of consideration and decision by at least three High Courts in India, and by the Chief Court of the Punjab.

Before commenting on those decisions some remarks of the position of advocates in Burma from the time when Legislative provision was first made in respect of them, may not be out of place.

Section 16 of Act XXI of 1863 (to constitute Recorder's Courts for the Towns of Akyab, Rangoon and Moulmein) provided that no person should be permitted to appear or act as the advocate of any suitor in any Court held under the Act unless such person had been licensed by the Recorder of the Court to do so. It gave the Recorders of Courts under the Act power to make rules for the qualification and admission of persons to act as advocates in their respective Courts. It also gave the right to any Advocate, Vakil, or Attorney-at-law of any of the High Courts of Judicature in India to act as an advocate in a Court under the Act without any license from the Recorder of the Court.

Section 17 of the Act gave power to a Recorder to withdraw or vacate any license granted by him.

Section 18 provided that the fees to be received by any advocate licensed under the Act, or entitled to act as an advocate, should be subject to the control and taxation of the Recorder having jurisdiction in the case in respect of which such fees were payable, and that no fees should be recoverable by any advocate except such as had been allowed by the Recorder on taxation.

Act VII of 1872 established for the first time the Court of the Judicial Commissioner as the highest Court of appeal in the province in cases which had been instituted in Courts outside of Rangoon and Moulmein.

Act XVII of 1875 gave the Judicial Commissioner power to make rules for the qualification, admission, enrolment, suspension and dismissal of advocates, and provided that no one should appear, plead or act as an advocate in his Court, or in any Court subordinate to his Court, unless such person had been licensed by him to do so.

Advocates, Vakils and Attorneys-at-law of High Courts in India were given the same privilege of appearing and acting without license as they had of appearing and acting before the Recorders.

A general provision was enacted that the fees to be received by an advocate for business does in any Court should be subject to the control and taxation of the presiding Judge of the Court, and that no fees should be recoverable unless they had been allowed on taxation.

Act XI of 1889 made no change in the law regarding advocates.

It will be noticed that the abovementioned Acts adopted the word "Advocate" as the appellation of all practitioners in the Courts of Burma instead of using the three words, "Advocate," "Pleader," "Mukhtar," used in India.



Under the above Acts persons with various qualifications were licensed to practice as advocates in two highest Courts in the province.

Act VI of 1900 constituted a Chief Court for Lower Burma. When it came into force, the Legal Practitioners Act, 1879, was extended to Lower Burma. Under that Act the word "Advocate" is applied only to the practitioners of highest grade admitted to a High Court or Chief Court.

Section 40 of the Lower Burma Courts Act enacted that every person entitled immediately before the commencement of the Act to appear, plead or act in the Court of the Recorder of Rangoon, or in the Court of the Judicial Commissioner, Lower Burma should be entitled to be enrolled as an advocate of the Chief Court.

The rules made by this Court provide that in future none but Barristers-at-law of England or Ireland and members of the Faculty of Advocates in Scotland may be admitted as advocates of the Court, but by virtue of the above section the present body of advocates of the Court includes gentlemen who are not precluded from suing for remuneration for work done by them, and who are not exempt from liability for negligence.

*Prima facie* there appears to be no strong reason why one advocate should be under a disability not shared by his fellow advocate. The inability to sue for fees can only attach to an advocate who is an English or Irish barrister; if the common law rule of English law that a barrister cannot sue for remuneration for work done professionally by him applies to him when he practises as an advocate in this province.

From the commencement barrister advocates in this province have "acted" as well as "pleaded" in the Courts. There has been no separate body of Attorneys-at-law or Solicitors practising only as attorneys or solicitors, and confined as such to performing certain functions.

Not only have barrister advocates done work which in England they cannot do, but almost *ex-necessitate* they have joined in partnerships in order to facilitate the conduct of business.

In the case of *The Land Mortgage Bank of India, Ltd. v. Elmes* (1), the then Recorder of Rangoon informed the learned Judges of the High Court of Calcutta that an advocate in Rangoon ordinarily and necessarily combines the functions of counsel and attorney, there being no attorneys in British Burma. Mr. Elmes was a Barrister-at-law. The learned Judges, referring to section 59 of the Burma Courts Act, 1872, said that the provision clearly pointed to an advocate's capacity to sue for his fees, or claim them as a debt, and Mr. Elmes appeared to them to have been merely an advocate admitted to practice upon his qualification as a barrister. He was sued by the Bank, and he apparently claimed to set off against the amount claimed by it sums due to him for fees for professional work, as well as commission for acting as the Bank's agent. As regards his claims for professional work he was held entitled to recover charges not very much in excess

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of those which an attorney in Calcutta would receive. This case is the only reported case dealing with the question whether a barrister advocate under the Act previous to the Lower Burma Courts Act, 1900, could sue for fees, and it is in favour of the view that he could do so.

Advocates, however, are now subject to the provisions of the Legal Practitioners Act. That Act is silent as to whether an advocate can sue or be sued. An advocate is an agent, and *prima facie* an advocate has the right of an agent under the law of agency as laid down in the Indian Contract Act, and is also subject to the liabilities of an agent under the law.

The Punjab Chief Court and the Allahabad High Court, however, have decided that an advocate who is a barrister cannot sue for fees and cannot be sued for negligence. The leading case in the Punjab Chief Court is that of *Grey v. Diwan Lachman Das* (2). The case was heard by a bench of five Judges of the Court. Two of the learned Judges were of opinion that Mr. Grey could maintain his suit for fees, but the majority held that he could not do so. The judgments set out so fully and ably the arguments for and against the proposition, that it is unnecessary to examine them at length. One of the learned Judges who formed the majority made the following observations :—

It may be said that Mr. Grey practises in the Punjab, not as a member of the English Bar, but as an advocate of the Chief Court of the Punjab, duly enrolled in accordance with the rules framed by the said Court under the provisions of section 41 of the Legal Practitioners Act; that it is immaterial to the Courts whether he is, or is not, an English barrister; that all they are concerned with is, whether he is, or is not, an advocate of the Chief Court of the Punjab or of Chartered High Court; and that he practises in them as a member of the Punjab or Bombay Bar as the case may be, and not as a member of the English Bar. I must admit that considerations of this nature are entitled to considerable weight, and if the question had not already been twice decided by Full Benches of this Court, I should have been more disposed than I am now to hold that the present suit is maintainable.

I have quoted the above observations because it appears to me that the arguments to which the learned Judge refers are unanswerable.

The case of *Queen v. Duoutre* (3) before their Lordships of the Privy Council was considered in the above case and the learned Judges entertained conflicting opinions as to the effect of certain observations of Lord Watson in course of the judgment. In *C. Ross Aston v. Pitambar Das* (4), the learned Chief Justice of the Allahabad High Court quoted these observations, and held that they clearly supported the appellant's (a barrister advocate) contention that he was not liable to be used for recovery of a fee paid for work which he had not done.

Lord Watson's remarks is as follows :—

The right of the respondent to sue for remuneration does not appear to them (their Lordships) to depend either upon the law of the place where the employment was given, or upon the law of the locality within which it was to be performed. When an advocate or other skilled practitioner in law and the Custom of his profession entitled to claim and recover payment for his professional work, those who

(2) (1895) P.R., 219.

(3) (1884) L.R. 9 A.C., 735.

(4) (1903) I.L.R. 25 All., 509.

engage his services must, in the absence of any stipulation to the contrary, expressed or implied, be held to have employed him upon the usual terms according to which such services are rendered. This is the implied condition of every contract of employment which is silent as to remuneration, and it is a condition dependent upon the professional status and rights of the person employed, and not upon the law of the place where his services are to be given, so long as he is employed in his professional capacity. A member of the Ba. of England in accordance with the law of that country and the rules of the profession to which he belongs, renders and professes to render services of a purely honorary character. If, in his professional capacity as an English barrister, he accepted a retainer to appear and plead before Commissioners or arbitrators in a foreign country by whose law counsel practising in its regular Courts were permitted to have suit for their fees, that would not give him a right of action for his *honoraria*. His client would have a conclusive defence to such an action on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms upon which members of that Bar are understood to practise.

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The meaning of these observations appear to me clear, and the illustration which is Lordship gives leaves no doubt as to what he meant. How do they apply to a barrister who comes out to and settles in India, and is admitted to practise as an advocate of a Chief Court?

As a barrister he has no right to practise in India. He asks for permission to practise as an advocate. He, on admission, subjects himself to a disciplinary authority to which he is not subject as a barrister. Surely thenceforward he cannot be said to hold himself out as practising as a barrister, when in parts of India other than the Presidency Towns, he, daily perhaps, breaks the rules which would apply to him if he practised in England or Ireland. Surely it must be held that he has elected to practise as an advocate of the Court to which he has been admitted, and to do all that an advocate of such Court is permitted to do. From the point of view of his clients, can it be said that they engage him only because he is a barrister? Would any client engage a gentleman to appear for him in litigation unless he believe that he was one of the persons, no matter what they might be called, who was entitled to appear for him in the Courts? With great deference to the judgment of the learned Chief Justice of Allahabad, I am lead to a conclusion opposed to his view as to the effect of Lord Watson's observations when applied to the case of a barrister who settles in India and obtains admission to a High Court or Chief Court other than High Courts in the Presidency Towns, in which latter the English system of counsel not appearing except on the instructions of an attorney is still adhered to. It appears to me that when a barrister comes to this country and settles down to work as an advocate, he elects to do such work as any other advocate of the Court to which he is admitted may do, and he undertakes the same liabilities as other advocates have. The case is in no way different from that of an English or Irish barrister who goes to and is admitted to practise in one of the British Colonies in which the two branches of the profession have been amalgamated. He may no doubt remain a barrister, and as such entitled to practise in English or Irish Courts, but here in India he practises as an advocate; he cannot practise except as such,

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and he is engaged as such. His professional status in India is that of an advocate, and the law applicable to him is the law of and the custom in India applicable to advocates of the Court in which he practises.

For these reasons I think the Additional Judge of the Small Cause Court erred in law in dismissing the suits now under revision, and as there are findings in favour of the plaintiff and plaintiffs on the merits in each case I would set aside the decrees and would direct that decrees be passed and entered up in each case for the amount claimed with costs.

*Bigge, J.*—The question of decision is whether the Additional Judge of the Small Cause Court was in error in deciding in Civil Regular Nos. 7637, 7638 and 7639 of 1905 that the plaintiff or plaintiffs was or were incapacitated from suing to recover in those suits on the ground that he or they is or a barrister or barristers; and to put the question generally, can an English barrister who has been admitted to the office of an advocate of this Court sue to recover his fees for work done, and conversely can he be sued by a client for negligence?

The Indian case in which the matter has been most exhaustively examined is *Grey v. Diwan Lachman Das* (2), in which it was held by three Judges out of five composing a Full Bench, that the plaintiff was incapacitated from making a contract of hiring as an advocate by the usage and constitution of his bar. The point had been previously decided by the Punjab Chief Court, but as it seemed to Rivaz, J., that the applicability of the absolute rule laid down in *Kennedy v. Bacon* (5), to the case of a lawyer in an English Colony who is not a mere advocate or a pleader and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by action of law, had been seriously doubted by their Lordships of the Privy Council in *Regina v. Doutré* (3), he directed the appeal to be laid before a Full Bench.

It is not necessary to set out the facts in *Regina v. Doutré* (3), as the report is available to all. In that case the respondent, though a member of the Bar of Quebec and a Queen's Counsel by patent, does not appear to have been a member of the English Bar, which however is not a matter of any importance. Their Lordships entertained great doubts on the point referred to by Rivaz, J., but did not decide it. But it is of great importance in this, as the words I have already quoted are a faithful description of the functions discharged by an advocate here, who acts in the Court as a barrister and out of it as a solicitor, and in some cases has been known to go into partnership with other advocates and with solicitors—a course of conduct which is absolutely prohibited by the rules of English Bar.

The solution of the question under reference seems to me to be contained in these words at page 752 of their Lordships' Judgment:—

A member of the Bar of England, in accordance with the law of that country

and the rules of the profession to which he belongs, renders and professes to render services of a purely honorary character. If in his professional capacity as an English barrister, he accepted a retainer to appear and plead before commissioners or arbitrators in a foreign country by whose law counsel practicing in its regular Courts were permitted to have suit for their fees, that would not give him a right of action for his *honoraria*. His client would have a conclusive defence to such an action on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of the Bar are understood to practise.

I would point out the stress that is laid by their Lordships upon (1) the law of England, and (2) the rules of the Bar. In extra-judicial proceedings, such as sittings of arbitrators or commissioners, no doubt a barrister would be entitled to appear and plead by virtue of his status as a barrister alone ; and as illustrating this point I would mention the recent arbitration as to the docks at Singapore ; but those would be matters in which this Court would have no more concern than it has with a barrister speaking at a public meeting. But as soon as he wishes to plead and act in the Courts, then this Court takes charge of him and does not permit him to open his mouth or do any act until he has been duly enrolled as an advocate under its rules. It will be seen therefore that the mouth of a barrister as such only is closed, and can only be opened by his enrolment as an advocate under the rules which are fully set out in the judgment of the learned Chief Judge and which I need not set out again. After enrolment, if fortunate enough to gain the confidence of clients, he practices not as an English barrister but as an advocate of this Court, to which he is amenable for discipline under the Legal Practitioners Act, 1879, and not merely to his Inn, though no doubt his Benchers at the same time have concurrent jurisdiction in case of misconduct. But the point I wish to emphasize is that punishment, if unfortunately the occasion should arise for its infliction, is in the hands of the Court to which he owes his professional existence here, and if he is dismissed from his office of advocate he can no longer open his mouth in our Courts, although the status of barrister still remains to him unless and until he is deprived of it by his Inn.

The words quoted by the learned Chief Judge from the Judgment of Stogden, J., at page 237 of the " Punjab Reporter " are very pertinent and seem to me to cover the case ; and it is evident that if the learned Judge had not felt himself trammelled by previous decisions he would have felt constrained to push them to their obvious conclusions and decide accordingly.

The remarks of Rivaz, J., at the foot of page 230 of the Report are worthy of consideration ; and although the remarks of Roe, J., at page 233 may be strong, they are so relevant to the matter under consideration that I think they are worthy to be quoted in full :—

The question is undoubtedly one of great difficulty, but to my mind this difficulty mainly arises from the interpretation which has already been placed by Indian Courts on the silence of the Legislature.

That is in the Legal Practitioners Act, which makes no provision for advocates suing for their fees.

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But for this I should feel no difficulty, for on the general merits of the case I have no doubt. Stated broadly, the question is merely this, are the Courts to refuse to recognize a contract, merely because the parties to it would, if the contract were made in England, owing to what is nothing more than a ridiculous fiction as to the nature of the consideration to be received by one of the parties—a fiction of which the other party is not aware and could not possibly understand—be incapable of enforcing it?

I concur in the order which the learned Chief Judge proposes to make in all these suits.

*Irwin, J.*—I concur in the opinion of the learned Chief Judge.

I think it is not open to us to go beyond the law as laid down in section 11 of the Contract Act.

The law in England is that the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation. If an English barrister settled in this country, without being admitted as an advocate of any Court in this country, then it is very probable that the incapacity to contract which attached to him in England would still attach to him here, but he would not be entitled to appear or plead as a barrister in any Court here. When he is admitted to practice in this Court, he must practice not as a barrister but as an advocate of this Court. If he ceased to be a barrister he would not necessarily cease to be an advocate of this Court. The fact that he is a barrister does not entitle him as of right to be admitted as an advocate. As an advocate he can do many things which as a barrister he would be debarred by the rules of his profession from doing. To my mind the only possible conclusion is that, though he does not cease to be a barrister, yet while practising as an advocate he is not as such subject to the personal law which made him as a barrister incapable of contracting.

The true application of Lord Watson's remarks in the case of the *Queen v. Doutré* (3) (page 752) seems to me to be this. If an advocate of this Court undertook to conduct any professional business in Singapore, the question whether he could sue for his fees for that business would be determined by the law to which he is subject as an advocate of this Court, not by the law of Singapore. This lends no support to the view that as an advocate he is subject to a disability (or entitled to a privilege) to which some other advocates of the same Court are not subject merely because one of the qualifications which rendered him eligible as an advocate is that he was a member of the English Bar.

I concur in the orders proposed by the learned Chief Judge.

*Hartnoll, J.*—The question for decision is whether an advocate of this Court, who is also a member of the Bar of England, has right of suit for recovery of sums claimed as fees for professional services rendered. I have had the privilege and advantage of reading the judgments of my learned colleagues, the learned Chief Judge and Mr. Justice Bigge, and I would answer the question in the same manner for the following reasons.

The law applicable to advocates in this country as to all other persons in the matter of contracts is that contained in the Indian Contract Act (IX of 1872) as subsequently amended. In England it

is settled law that a barrister can neither sue nor be sued in respect of professional services rendered as an advocate.

This was laid down in the case of *Kennedy v. Broun* (5) and again affirmed in the case of the *Queen v. Doultre* (3). But in India it seems to me that, unless by the provisions of the Indian Contract Act it can be shown that an advocate of this Court can neither sue nor be sued in respect of such services, it must be held that he can sue or be sued. Section 11 of the Act runs as follows :—

Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

The last words of this section seem to me to be most important ones for the decision of these cases, and the main question for consideration seems to me to be whether they do or do not make the law relating to advocates of this Court who are members of the Bar of England the same as it is England. Although in the case of the *Queen v. Doultre* (3) their Lordships were not considering the law in India they gave an instance which, in my opinion, would be governed by the last words of the above quoted section. They remarked :—

A member of the Bar of England, in accordance with the law of that country and the rules of the profession to which he belongs, renders and professes to render services of a purely honorary character. If, in his professional capacity as an English barrister, he accepted a retainer to appear and plead before commissioners or arbitrators in a foreign country by whose law counsel practising in its regular Courts were permitted to have suit for their fees, that would not give him a right of action for his *honoraria*. His client would have a conclusive defence to such an action on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of that Bar are understood to practice.

They at the same time doubted the universal applicability of the rule laid down by *Kennedy v. Broun* (5), for they wrote :—

Their Lordships are willing to assume that the law of England, so far as it concerns the right of the Bar of England to sue or make agreements for payment of their fees, was rightly applied in the case of *Kennedy v. Broun* (5) ; but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Erle, C.J.

It appears to them that the decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general consideration of public policy. Even if these considerations were admitted their Lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law.

Now in Burma an advocate who is a member of the English Bar does not, as far as I am aware, confine himself to advocacy, but he does combine in his own person the various functions which are exercised by legal practitioners of every class in England. Two of the cases now being dealt with were not for advocacy at all but for writing letters. I am not prepared to hold that, because a member of the Bar of England cannot practise in this Court without applying for admission and being admitted as an advocate, and because for disciplinary matters

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he is subject to the jurisdiction of this Court, the English rule does not therefore apply to him. On the contrary I am of opinion that the English rule would apply to an advocate of this Court who was a member of the English Bar and *who only practised as a member of the English Bar does in England*. If he deliberately held himself out to practice strictly on the same lines as are pursued by members of the English Bar in England, and if he refused all other sorts of work, it seems to me that he would bring the English rules of law to this country with him, and would be subject to it and disqualified from contracting. Even though he would have to obtain admission as an advocate of this Court in order to practise, yet his profession would be strictly that carried on by a member of the English Bar in England, and that would in my opinion be the determining factor and test as to whether the English rule should be deemed to apply to him or not.

But where a member of the Bar of England comes to this country and practises as a general practitioner, taking all sorts of work, it seems to me that his position and status must be looked at from quite a different point of view. He no longer holds himself out to practice according to the custom and usage of the English Bar, but he holds himself out to do work that is done by legal practitioners of every class in England. In the same case he is both solicitor according to the meaning in England of that word and pleader in Court. By the law in England he can sue and be sued for work done in his capacity as solicitor. I do not think that the following passage in *Kennedy v. Brown* (5) can be held applicable to him :—

With respect to the claim for compensation for leaving Birmingham and coming to London, and for services in issuing publications for the purpose of creating a prepossession in favour of the defendant, Mrs. Brown, there are several answers, of which two will suffice. The first is, that these services were ancillary to the service as an advocate; and, if the principal service could not be the subject of a contract, neither could any service which was merely accessory thereto, and of no value without the principal.

It cannot be said of him that the principal part of his work is advocacy. In some cases it no doubt is, but in others it is not, and sometimes a case that he undertakes has no advocacy work in it at all. Though he may be a member of the English Bar, he cannot be held to practice according to the customs and usage of England; but he holds himself out, and practises, as a general legal practitioner. It must further be borne in mind that legal practitioners of every class in England, the Bar alone excepted, can recover their fees by an action at law. Such an advocate is a barrister as known to the English Bar in England and something a great deal more. Advocacy is only one branch of his work. That being the case, even though he may be a member of the English Bar, I do not think that a rule of English law that applies to members of the Bar in England and the limited class of work performed by them, can be held to apply to him any longer. I hold that by his own action he causes the English rule no longer to apply to him, whether he considers it to confer a privilege or the contrary. I am therefore of opinion that the last words of section 11 of the Contract Act do not apply in such a case and that such an advocate would be competent of contract, and so to sue and be sued.

In the present instance the applicant is clearly a general practitioner and is not practising merely according to the usage and custom of the English Bar in England.

For these reasons I concur in the proposed orders of the learned Chief Judge in these suits.

1906.

A. P. PEN-  
NELL  
v.  
J. A. HARRI-  
SON.

Before Mr. Justice Hartnoll.

SAN DA AND SAN TU v. KING-EMPEROR.

*Sentence—Transportation and imprisonment—Offence punishable with less than seven years' imprisonment—Indian Penal Code, s 59.*

Criminal  
Appeal  
No. 754 of  
1906.

The accused were sentenced to seven years' transportation under section 307, Indian Penal Code, and to three years' transportation under section 440, Indian Penal Code.

December  
15th,  
1906.

*Held*,—that the sentence of transportation under section 440, Indian Penal Code, was illegal, because (1) section 59, Indian Penal Code, is not applicable in the case of offences punishable with less than seven years' imprisonment, and (2) in cases where section 59, Indian Penal Code, is rightly applied, no sentence of less than seven years' transportation for each offence can be passed. The sentence of three years' transportation was altered to one of three years' imprisonment.

*Queen-Empress v. Gour Chunder Roy*, 8 Suth. W.R., Cr., 2, followed.

The appeal was admitted to consider the sentences, since I see no reason to doubt that the two appellants have been rightly convicted. The sentences were seven years' transportation under section 307, Indian Penal Code, and three years' transportation under section 440, Indian Penal Code. The sentence under section 440, Indian Penal Code, is not legal.

In the first place the maximum term of punishment under section 440, Indian Penal Code, is five years, and so section 59, Indian Penal Code, does not apply, and in the second the minimum term for each offence is seven years.

In the case of the *Queen-Empress v. Gour Chunder Roy* (1) it was said:—

According to the construction which has been put upon section 59 by several decisions of the High Court, the correctness of which I do not question, no sentence of transportation for a shorter period than seven years can be passed in any case. The words 'in every case' in section 59 have been construed as 'on any charge' or 'for any offence'; therefore the sentence of three years' transportation in the present case cannot stand.

It seems to me that the above construction is the right one to place on the words "in every case" in section 59, Indian Penal Code.

The sentence of seven years' transportation under section 307, Indian Penal Code, will stand. That of three years' transportation under section 440, Indian Penal Code, is set aside as illegal, and instead thereof it is ordered that Maung San Tu and Maung San Da be rigorously imprisoned for three years—this sentence will commence on the expiration of the first.

(1) 8 Suth. W.R., Cr., 2.



### Privy Council.

(On appeal from the Chief Court of Lower Burma.)

*Before Lord Davey, Lord Robertson, Sir Andrew Scoble, and  
Sir Arthur Wilson.*

SHAHAR BANO O v. AGA MAHOMED JAFFER BINDANEEM  
AND OTHERS.

*Mahomedan Law—Religious trust—Appointment of female as trustee—Discretion  
of Court—Claims of lineal descendants.*

A decree made by consent of parties in the High Court at Calcutta on appeal from the Court of the Recorder of Rangoon directed that the trustee of a Mahomedan religious trust should retire, "and that a new trustee be appointed in his place by the Chief Court of Lower Burma, preference in such appointment being given to the lineal descendants of the settlor."

The settlor was a Mahomedan of the Shiah sect. Appellant, his daughter, although not an orthodox Mahomedan, but a Babi, was appointed trustee on the Original Side of the Chief Court.

On appeal to the Appellate Side of the Chief Court it was held that though appellant was not disqualified either by her sex or by her religious belief from holding the trusteeship, neither she nor the other lineal descendants of the settlor were suitable persons to be appointed. The appointment was therefore set aside.

*Held*,—that the authorities conferred no absolute right to the trusteeship on the lineal descendants of the settlor, who had not prescribed any line of devolution; and that, although appellant's sex did not disqualify her, the Chief Court had, under the terms of the decree of the Calcutta High Court, a discretion in making the appointment, and that under the circumstances it was properly exercised.

This was an appeal from a judgment of the Chief Court on it Appellate Side. The following preliminary order of the Chief Court (Sir Herbert Thirkell White, Chief Judge and Mr. Justice Fox) was delivered on the 17th January 1904 by—

*Thirkell White, C.J.*—This is an appeal from the order of the learned Judge of the Original Side of this Court appointing a trustee to carry out certain provisions of the will of one Haji Ahmed Bindaneem. The appointment was made in pursuance of a decree of the High Court at Calcutta on appeal from the Court of the Recorder of Rangoon. The decree of the High Court ordered that Aga Mahomed Jaffer Bindaneem should retire from the trusteeship and that a new trustee should be appointed by the Chief Court, preference in the appointment being given to the lineal descendants of the settlor, Ahmed Bindaneem. Of the lineal descendants of Ahmed Bindaneem it may be taken as established that only three, Shahar Banoo, his daughter and eldest child, Haji Miza Hashim and Haji Miza Jawad, two of his sons, are in any way eligible. The learned Judge on the Original Side, having special regard to her seniority in the family, has appointed Shahar Banoo.

In this appeal, exception is taken to this appointment of Shahar Banoo on the ground that she is a woman and that she is not a Mahomedan but a Babi. In support of the appointment it is urged that a woman can be a *Mutawalli* and that even a person who is not a Mahomedan can be so. It is also advanced that though a Babi, Shahar Banoo is at the same time a Mahomedan. There is authority

Civil First  
Appeal  
No. 20 of  
1903.  
January  
17th, 1904

for the position that Shahar Banoo is not disqualified by her sex or religion from being appointed as a trustee or *Mutawalli*. The learned Judge on the Original Side has cited passages from Sir Roland Wilson's *Digest of Anglo-Mahomedan Law* (p. 288) and Mr. Justice Amir Ali's work on *Mahomedan Law* (I. 347), and the law on this point seems to be sufficiently ascertained and settled.

At the same time although Shahar Banoo labours under no actual disqualification, it has still to be considered whether she has any special qualification for the appointment. It is true that the objects of the Trust do not seem to involve any duties of a spiritual nature, such as taking part in or conducting religious services or the like; and that they could be carried out by a deputy. But it is clear, also, that they have reference to religious observances of the Shiah sect, to which the settlor belonged; and it seems undesirable that a person should be appointed to be a trustee for purposes connected with these observances when she has no sympathy with or interest in them. If the settlor had appointed Shahar Banoo to be trustee, very likely her sex and religion would have been no good ground for removing her. But when a new appointment has to be made, these considerations are of weight in deciding whether Shahar Banoo is the right person to be selected.

Much attention was directed in the course of the argument to the question whether a member of the Babi sect was or was not a Mahomedan. The learned Counsel for the respondent cited Lord Curzon's work—*Persia and the Persian Question*—and a work by Mr. E. G. Browne, Lecturer in Persian to the University of Cambridge, a translation of the *Tarikh-i-Jadiâ or New History of Miza Ali Mahomed the Bab*. In the Translator's introduction to the latter work occurs the following passage:—

"A remembrance of all the wrongs which he and his co-religionists had suffered at the hands of the Musulmans further caused him (Beha) gradually but steadily to eliminate the tinge of Mahomedan, and more especially of Shi-ite, thought which the Babi doctrine still maintained, while ever seeking a better understanding with the Christians, Jews, and Zoroastrians, with all of whom he recommended his followers to consort on friendly terms" (p. xxv).

Lord Curzon refers to the Babi movement as a "heresy in the Mahomedan Church" (I. 497). He states that they have secured many proselytes among the Jewish populations of Persian towns (I. 500). He writes:—

"According to the Babi view, God is not a person as in the Bible or in the Koran, but a spiritual essence, perpetually communicating and reproducing itself \* \* \*. To whatever extent the average Babi has imbibed or holds these doctrines, he appears to have absolutely cut himself adrift from Mahomed and the Koran. He believes in the divinity of Beha, and, it may be added, of Christ, as several incarnations of the Deity; and his scriptures may be described as a curious amalgam of the Bible, Sufism, and Koran" (I. 503).

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If these descriptions are correct, it seems to me impossible to hold that the Babi is merely a Mahomedan sect. It would be as reasonable to hold that a Christian is merely a Jewish sectary—a view, it may be observed, prevalent among the contemporaries of the early Christians. But in the view which I take of this case, the point does not seem to be material.

I think that Shahar Banoo, though not disqualified from holding the post of trustee, is not a fit person to be selected as such. She would have to perform her duties by a deputy and, as she herself would take no interest in the object of the trust, there is no guarantee that she would appoint a deputy who would do so. As we have to make a new appointment, it seems natural that we should seek some one who belongs to the same religion and sect as the settlor and who will take an interest in carrying out the provisions of the trust.

The other two of the settlor's descendants, Miza Hashim and Miza Jawad, are also open to objection on the ground that they are, or till recently have been, residents of Bagdad. They say that they have now settled in Rangoon; but there is no guarantee that this is the case or that they intended to stay permanently here. It seems desirable that the trustee should be a resident of Rangoon, capable of discharging the duties of the trust in person. Although we have to give preference to the lineal descendants of Ahmed Bindaneem, I do not read the decree of the High Court as restricting the choice exclusively to that class. If there are no such lineal descendants fully qualified for appointment, then it is within our powers to go beyond the limits of the family in making the appointment.

I think that the final decree in this appeal should be postponed for a month in order that the parties may come to an agreement as to the appointment of a suitable person, preferably a Shiah resident of Rangoon, who need not be connected with the family of Ahmed Bindaneem. If at the end of that period the parties have been unable to come to an agreement, then I think we should select a suitable person for the appointment. It should be understood that we shall set aside the appointment of Shahar Banoo and that we shall not appoint Miza Hashim or Miza Jawad, unless either of these persons should be selected by all parties to this appeal.

*For, J.*—I concur.

The final judgment of the Chief Court (Sir Herbert Thirkell White, Chief Judge, and Mr. Justice Bigge) was delivered on the 22nd February 1904 by—

February  
22nd, 1904.

*Thirkell White, C.J.*—The conclusion come to by the Bench by which this case was heard has been stated in the preliminary order.

We reverse the order of the Court of first instance appointing Shahar Banoo to be trustee of the trusts created by the late Haji Ahmed Bindaneem; and we appoint as trustee Aka Mahomed Sherazee, Merchant, of 29, Merchant Street, Rangoon.

We also direct that the costs in both Courts be paid out of the trust estate. Costs at 5 gold mohurs for each Advocate; but only one Advocate to be allowed on each side.

The judgment of their Lordships of the Privy Council was delivered on the 14th December 1906 by—

*Sir Arthur Wilson.*—Hajee Ahmed Bindaneem, a Shiah Mahomedan, died in 1882, leaving a will by which he devoted the one-third of his estate of which he was capable of disposing to religious and charitable purposes. The testator left six sons and one daughter, of whom the eldest was a son, Mahomed Jaffer, the first Respondent, and the second a daughter, Shahar Banoo, the Appellant. In his will the testator said: "I appoint my obedient son Aga Mahomed Jaffer Bindaneem my legal executor. And the superintendence of all the affairs relating to the heritage and the *sools* is entrusted to Aga Ahmed Ispanhani."

He further said :—

"5. The furniture, such as lamps, utensils for cooking, carpets, silver *alamas*, silver *sarposh*, and all the articles belonging to the Emambara, shall not be the subject of inheritance, and shall be used by the executor in performance of *taziadari* rites.

"6. The executor shall, after taking possession, with the information of the Nazir, of the *sools*, purchase therewith (in the) share market any good property or Government paper and shall out of the income thereof spend Rs. 1,000 during the first ten days of Mohurram every year, in accordance with the custom in vogue, in performance of the *taziadari* and distribution of food in connection with the Emambara. The expenses that are to be preferred to all the expenses to be met out of the income of the said property, are those of sending money to Kerbela or Holy Najaf and engaging *naib* (proxy) on remuneration for the performance of prayer and fasting in my stead for the omissions during sixty years of my age; provided these be done through any *muftahid*. And next to these are the expenses of engaging *naib* for visiting Khana-e-Kho-da (House of God), the holy shrine of the Prophet and those of Imams (who guided people in the right path), and for visiting the shrine of Raza (on whom may God send His thousand blessings). Next to these are the expenses of heirs and nearest relatives, if they stand in need, or the expenses of repairing mosques or performance of *taziadari* on the nights preceding Friday, and distributing food, and feeding travellers, to the possible extent."

Mahomed Jaffer obtained probate of the will, and carried on the administration of the estate until 1897. In that year the present appellant and other members of the family, who are or were parties to the present appeal, brought a suit in the Court of the Recorder of Rangoon against Mahomed Jaffer, in which they charged him with certain breaches of trust. They asked that the trustee should be removed from his office and that a Nazia should be appointed.

In 1898 the Recorder of Rangoon made his decree, by which he refused to remove the trustee from his office, but directed him to keep proper trust accounts for the future. Against that decree an appeal was brought, in accordance with the law then in force, to the High Court at Calcutta. While the case was before that Court a compromise was arrived at in accordance with which a decree was passed on the 13th May 1902, by which it was decreed that Mahomed Jaffer should retire from the trusteeship "and that a new trustee be appointed in his place by the Chief Court of Lower Burma, preference in such appointment being given to the lineal descendants of the settlor."

Upon that the case went back to the Chief Court in Rangoon, and was disposed of in the first instance by Chitty, J. At that stage of the

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case several different members of the family claimed to be entitled to the trusteeship, but of those claims it is only necessary, for the purpose of the present appeal, to notice that put forward on behalf of the now appellant, the principal plaintiff in the suit. Her case was that as the next in seniority, after the retiring trustee, of the children of the testator, she was entitled to be appointed trustee or *Mutawalli* of the endowment. Two specific objects to her appointment were raised : first, that as a woman she was disqualified from carrying out the trusts ; secondly, that being a member of the Babi sect, she was excluded from the trusteeship of an orthodox Shiah endowment.

The learned Judge overruled these objections, and appointed the lady to the position which she sought. An appeal against that order was heard before the Chief Judge and Bigge, J. Those learned Judges agreed with Chitty, J., in thinking that there is no legal prohibition against a woman holding a *Mutawalliship* when the trust, by its nature, involves no spiritual duties such as a woman could not properly discharge in person or by deputy. And it appears to their Lordships that there is ample authority for that proposition.

It was held secondly, in accordance with the view of the first Court, that " the objects of the trust do not seem to involve any duties of a spiritual nature such as taking part in or conducting religious services or the like, and that they could be carried out by a deputy."

This proposition is perhaps not quite so clear as the first ; the case seems to be rather close to the line. But for the purpose of the present judgment their Lordships assume the view taken in Burma to be correct.

The Court of Appeal also agreed with the first Court in holding that one who is not a Mahommedan, and *a fortiori* one who is so but who follows a sect not orthodox according to the standard of the settlor, is not disqualified by law for the post of *Mutawalli*. The authority for this view is somewhat scanty, but for the purpose of the present judgment their Lordships assume it to be correct.

But having conceded these points in favour of the now appellant, the learned Judges held that they did not necessarily conclude the case, but that the Court had still a discretion to exercise in the selection of a trustee. In exercising that discretion they took into account the nature of the duties imposed upon the trustee, the fact that the appellant, by reason of her sex, could at best discharge many of her duties only by deputy, and the circumstance that the appellant is a Babi, and as such might take a less zealous interest in carrying on the religious observances of the Shiah school. And in the result the learned Judges set aside the order which dominated the appellant, and appointed as trustee one Aga Mahomed Sherazee, who appears to be a Shiah resident in Rangoon, not apparently a lineal descendant of the testator. Against that order the present appeal has been brought.

On the argument of the appeal it was not disputed that the rights of the parties, as between themselves, are governed by the terms of the consent decree of the 13th May 1902, which directed merely that a new trustee should be appointed by the Chief Court, " preference

in such appointment being given to the lineal descendants of the settlor." But it was said (and no doubt rightly) that, in construing that decree, account should be taken of what the previously existing rights of the parties under the Mahommedan law were. And it was contended that under that law, and therefore (it was said) under the consent decree, the appellant as the senior in order of the children of the testator, not being subject to any legal disqualification, had an absolute right to the trusteeship, and that the Court possessed no such discretion as it claimed to exercise.

Their Lordships' attention was called to the earlier texts bearing upon the matter, which are few in number, and to the interpretation placed upon them by modern writers. The authorities seem to their Lordships to fall far short of establishing the absolute right of the lineal descendants of the founder of the endowment, in a case like the present, in which that founder has not prescribed any line of devolution.

Their Lordships are of opinion that the Court had a discretion to exercise in the selection of a trustee, and that the circumstances by which the learned Judges were guided in the exercise of that discretion were matters proper for their consideration. Their Lordships see no reason to dissent from the conclusion arrived at. They will humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs.

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*Before Sir Charles Fox, Chief Judge, and Mr. Justice Irwin, C.S.I.*

#### SHWE GAUNG v. THE COLLECTOR.

S. C. Dutta—for appellant. | Lentaigne—for respondent.

*Basis of decision in and acquisition proceedings before Court—Method of assessment of compensation—Limit of compensation by amount of claim—Value of trees—Market value—Land Acquisition Act, 184, ss. 9, 22, 23.*

Proceedings before the Court under section 22 of the Land Acquisition Act are not a continuation of the administrative proceedings before the Collector, but are judicial. The decision therein must therefore be based solely on evidence before the Court or on admissions by the parties.

It is compulsory for the Judge to take into consideration the matters referred to in section 25 of the Act, and to allow compensation for such of them as are admitted or proved to exist.

A claimant cannot be awarded an amount larger or on other heads than he claimed in response to the notice issued under section 9 of the Act, even though he did not then know when the Collector would take possession, and consequently could not accurately estimate the damage he would suffer.

The value of trees on the land acquired cannot be awarded separately and in addition to the market value of the land, but must be included in the amount at which the market value is assessed. The second head of section 23 of the Act refers only to crops or produce which have been grown between the date of declaration of the intention to acquire and the date of the Collector's taking possession.

*Eara v. Secretary of State for India in Council*, (1905) I.L.R. 32 Cal. 605, followed.

*Ma Gyi v. The Secretary of State for India in Council*, 3 L.B.R., 117, referred to.

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laneous  
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*Fox, C.J.*—A declaration that portions of the appellant's lands were needed for a public purpose was published in the official gazette, but the date of the publication does not appear in the records before us.

The Collector ordered a special notice to issue to the appellant under section 9 (3) of the Act, and the appellant made a claim pursuant thereto.

In this claim he asked for compensation at the rate of Rs. 500 per acre for his garden land. In his petition he gave a list of the trees on the part which was to be acquired. This list included 74 marian trees bearing fruit and 100 marian trees which were not fruit-bearing.

The area of the land taken was 83 of an acre. The Collector awarded Rs. 66-6-4 as the market value of the land at the rate of Rs 80 an acre; Rs. 21-13-1 for damage sustained by the appellant by reason of the taking of trees; Rs. 44 for damage sustained by the appellant in consequence of the servance of the land taken from the appellant's other land. The total amount awarded, inclusive of the 15 per cent. on the market value, came to Rs. 149-1-10. The amount of Rs. 28-13-1 awarded for damage for taking trees was arrived at by taking Rs. 200 as the yearly income or earning from 5 acres of garden land. The sum of Rs. 44 for severance was based on the Collector's estimate that the marked value of the lands left to the appellant would be lessened by 10 per cent of the value of the total area of his holdings.

The appellant accepted the amount awarded by the Collector under protest, and required a reference to the District Court. In his demand for a reference his sole ground of objection was that he had not been awarded compensation for the value of each fruit tree. He put the total value of these trees down at Rs. 9, 187-4-0.

The District Judge could not accept with confidence any of the evidence which was put before him, and consequently took the course of seeking from the Collector's proceedings material for making an award. Taking an admission of the applicant in those proceedings that he made from Rs. 300 to Rs. 400 per annum by the sale of fruit from his 5.50 acres, he fixed the amount to be awarded as market value at six times the annual profits of the '83 of an acre taken up. This came to Rs. 339-8-7, and he allowed nothing for damage for taking of trees or for severance.

This method of arriving at what should be awarded as compensation may possibly be a fair one, but it is not one authorized by the Act.

In the first place it has now been definitely laid down by the highest tribunal in *Ezra v. Secretary of State for India in Council* (1) that proceedings of the Collector under section 11 to section 15 of the Act are administrative, and not judicial. The proceeding before the Court under section 22 is of course judicial, and therefore entirely distinct from the Collector's proceedings, and in no way a continuation of such proceedings. Being a judicial proceeding, the decision in it must be based on evidence before the Court or on admissions made by the opposite party.



Again a Judge is not at liberty to say that he does not consider that compensation is called for on any of the heads mentioned in section 23 of the Act, if there is evidence or an admission that the claimant has sustained damage covered by any of such heads. Section 23 of the Act renders it compulsory on a Judge to make into consideration certain matters and to allow compensation for such of them as are admitted, or as he finds on the evidence before him to exist.

Although the District Judge's award was arrived at by an unauthorized method, I do not see my way to interfering with it. The difficulties about doing so are of the appellant's creation.

In the first place he claimed compensation at the rate of Rs. 500 an acre only, in response to the notice issued under section 9 of the Act. Consequently under section 25 he could not be awarded an amount larger than what he then claimed. That section practically renders it imperative upon a claimant to claim, in response to a notice under section 9, compensation under every head on which compensation may be awarded under section 23, although, at the time he puts in his claim, he cannot know when the Collector will take possession of his land, and consequently cannot with any degree of accuracy form an estimate of what he should claim for damages which have to be assessed in reference to that time.

The appellant in his objection to the Collector's award represented that he had been given to understand that the value of each fruit tree would be given, and he claimed that such value should be given in addition to the market value of the land. The Collector in his reference stated that he had not given the appellant to understand that he would be given the value of each tree in addition to the market value of the land. There is no authority given by the Act for assessing compensation in this manner. Under clause (a) of section 3 of the Act "land" includes things attached to the earth, and consequently in assessing the market value of land at the date of the declaration of intention to acquire it, the value of trees on the land on that date must be allowed for, but this must be included in the market value of the land. The appellant appears to rely on the second head of ground for compensation under section 23, as entitling him to the value of trees distinct from and in addition to the market value of the land. The clause is as follows :—

The damage sustained by the persons interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof.

This does not afford ground for allowing compensation in the manner claimed by the appellant. The provision was evidently inserted in consequence of the change made by the Act in the time at which the market value of the land is to be taken. In the former Act that time was the date of making the award. In the present Act the time is the date of the declaration, but under section 16 of the present Act the land does not vest in the Government until the Collector has made an award and has taken possession of it. This he may possibly not do until long after the date of declaration of intended acquisition, and

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in the interval a crop may have been grown on the land, or fruit or other valuable produce of trees may have grown, which possibly the owner may lose the benefit of, if the Collector takes possession before the crop or produce has been gathered. The second head for consideration under section 23 is the damage which the owner has suffered by reason of his having been deprived of such crop or produce, and it has no reference to the value of the trees which produce the fruit or other produce. There is no evidence in this case that the appellant lost the benefit of any fruit or other produce of trees on the land by reason of the Collector having taken possession at the time he did; consequently there is no evidence on which compensation could be awarded under the above head.

When the question of the market value of the land is considered in the light in which it should be, namely, by including the value of any trees on the land with the value of the land itself, there is in the first place no distinct evidence that there were any trees on the land at the date of the declaration of intention to acquire it. The case in the District Court would appear to have been tried together with that of Ma Gyi, which subsequently came to this Court on appeal—see *Ma Gyi v. The Secretary of State for India in Council* (2). In that case the land had been entered on and the trees on it had been cut down before the date of the notification of intention to acquire. The same may have been the case in the present case.

But if it is assumed that there were trees on the land taken up on the date of the notification, the evidence as to the number, nature and value of such trees and of the land is of such an uncertain and contradictory nature that no reliance can be placed on it, and no conclusion as to the market value of the land can be come to.

Moreover, in his grounds of appeal to this Court the appellant does not contest the District Judge's award in respect of the market value of the land. He only claims that he should have been awarded Rs. 1,000 as damages. He does not explicitly say for what, but as his memorandum refers only to the value fixed upon the trees being inadequate, it may be assumed that he claimed damages under the second head of compensation in section 23. As I have shown before, he has not proved that he was entitled to any compensation for damage covered by that head.

If he had objected to the District Judge's award on the ground that the Judge had not allowed him anything as damage for severance, even although the Collector admitted that he was entitled to an amount for severance, he might have been entitled to have the District Judge's award altered and enhanced by at least the amount which the Collector admitted he was entitled to; but he made no such objection to the Judge's award, and it was not argued that he should be allowed anything except for the value of trees.

Under the circumstances I think the appeal must be dismissed with costs.

*Irwin, J.*—I concur.

*Before Mr. Justice Irwin, C.S.I.*

SUPAL PANDAY *v.* SUKKHU KOIRI.

*Pennell*—for appellant (defendant).

*Withdrawal of application for removal of attachment—Bar to suit—Suit for recovery of attached property—Miscellaneous application—Civil Procedure Code, ss. 278, 283, 373, 647.*

*Civil 2nd  
Appeal  
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*March 7th,  
1907.*

The withdrawal of an application made under section 278 of the Code of Civil Procedure for removal of attachment, without the permission of the Court, does not bar a subsequent suit for declaration of title to the attached property.

The plaintiff-respondent applied for removal of attachment under section 278, Civil Procedure Code, but withdrew his application without giving any reason for so doing. He then instituted this suit for a declaration of his right to the attached property. He obtained a decree, which was confirmed on first appeal. Defendant prefers this second appeal on the ground that the suit does not lie by reason of the withdrawal of the applications under section 278.

His advocate admits that if no application under section 278 had ever been made a suit would lie, but he contends that the suit is barred by section 373 of the Code, that section being made applicable to miscellaneous proceedings by section 647.

Section 647 makes applicable "the procedure herein prescribed." It is not quite clear that the bar to a fresh suit which is created by section 373 is a matter of procedure at all; but it is not necessary to decide that point, for it appears to me to be quite clear that if section 373 applies to miscellaneous applications it must be made applicable by reading the word "application" instead of suit, and this must be done in every place where the word "suit" occurs in the section. The second clause then reads thus, "if the applicant withdraw from the application . . . without such permission . . . he shall be precluded from bringing a fresh application for the same matter." It bars a fresh application of the same nature as the one from which the applicant withdrew; it says nothing about a suit. In fact the expression "a fresh suit" would be nonsense when no previous suit had been instituted.

The appeal is dismissed under section 551, Civil Procedure Code.

*Before Mr. Justice Hartnoll.*

VYRAVEN CHETTY *v.* S. R. M. MEYAPPA CHETTY BY HIS DULY  
CONSTITUTED AGENT VELLETPA PILLE.

*Agabeg*—for applicant.

*A. D. Nariman*—for respondent.

*High Court—Revisional jurisdiction—Powers of High Court in revision—Disputes as to immoveable property—Moveable property—Criminal Procedure Code, 1898, Chapter XII s. 435 (3).*

*Criminal  
Revision  
No. 1782 of  
1906.*

*March 27th,  
1907.*

Sub-section (3) of section 435, Code of Criminal Procedure, does not bar the revisional jurisdiction of the High Court in a case where an order purporting to be made under Chapter XII of the Code of Criminal Procedure has been made without jurisdiction.

An order purporting to be made under section 145 of the Code of Criminal Procedure, but dealing with moveable property, was set aside in revision.

*Raj Chundro v. Po Sein*, 2 L.B.R., 239, referred to.

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*Roop Lal v. Manook*, (1898) 2 C.W.N., 572; *Ananda Chandra Bhattacharjee v. Stephen*, (1891) I.L.R. 19 Cal., 127; *Doulat Koer v. Rameswari Koeri*, (1899) I.L.R. 26 Cal., 625; *In the matter of the petition of Nathu Mal*, (1902) I.L.R. 24 All., 315; *Isab Mondal v. The Emperor*, (1903) 8 C.W.N., 373; followed.

The facts of the dispute are clearly given in the order of the Magistrate, dated the 28th November, and as regards the shop the learned counsel for the applicant does not wish the order to be interfered with. He, however, desires that all orders as regards the moveable property be cancelled, though he does not contend that I should order all the moveable property to be given back to his client.

On the 29th November last the Magistrate, purporting to act under section 145 of the Code of Criminal Procedure, ordered that certain moveable property be made over to Velletapa, and this order was duly carried out. It is contended that section 435 (3) of the Code of Criminal Procedure prevents this Court from interfering in revision, and I was referred to the case of *Raj Chundro v. Po Sein* (1). The learned Chief Judge in that case said: "The question whether the High Court has power to revise proceedings which, though purporting to be held under Chapter XII, do not really come within its scope, does not seem to arise on the reference as stated. It is unnecessary therefore to express an opinion on it." Therefore that case only referred to cases where the Magistrate acted with jurisdiction. In the present case it seems to me that the order of the Magistrate touching the moveable property was made without jurisdiction, as Chapter XII of the Code only deals with disputes as to immoveable property, and that as regards such property section 435 (3) would not bar the revisional jurisdiction of this Court. The view I take is not without authority, for I would refer to the following cases, which were brought to my notice at the hearing:—*Roop Lal Dass v. Manook* (2), *Ananda Chandra Bhattacharjee v. Stephen* (3), *Doulat Koer v. Rameswari Koeri* (4) *In the matter of the petition of Nathu Mal* (5), *Isab Mandal v. The Emperor* (6).

The order of the Magistrate of the 29th November referring to the moveable property was in my opinion made without jurisdiction, and holding that this Court has power in revision to interfere with it, I accordingly set it aside as prayed for. I make no order for the return of the property that passed hands in accordance with the terms of the above order.

(1) L.B.R., 239.

(2) (1898) 2 C.W.N., 572.

(3) (1891) I.L.R. 19 Cal., 127.

(4) (1899) I.L.R. 26 Cal., 625.

(5) (1902) I.L.R. 24 All., 315.

(6) (1903) 8 C.W.N., 373.

### Privy Council.

(On appeal from the Chief Court of Lower Burma.)

*Before Lord Davey, Sir Andrew Scoble, and Sir Arthur Wilson.*

MOOLLA CASSIM BIN MOOLLA }  
AHMED—APPELLANT. } v. { MOOLLA ABDUL RAHIM  
AND OTHERS—RESPONDENTS.

*Burden of proof—Presumption as to death—Presumption as to date of death—Evidence—Admission—Arbitrator's award—Share of missing heir—Mahomedan Law—Indian Evidence Act, 1872, ss. 107, 108.*

A, a Mahomedan, died in 1884, and his estate was divided amongst his heirs by an arbitrator. B, the eldest son of A, had disappeared in 1870 and had not since been heard of; and in accordance with a rule of Mahomedan Law, a share of the estate was set aside for him as a missing heir.

C, the son of B, claimed this share, to which he would have been entitled, under Mahomedan Law, if B had been alive at the time of A's death, but not otherwise.

*Held*,—that the special rules regarding burden of proof in sections 107 and 108 of the Indian Evidence Act, could only be applied with reference to the date of the suit, and not to the question whether B was alive or dead on a specified prior date; and that the burden of proving that B was alive in 1884 lay upon C, who affirmed it.

*Held further*,—that the arbitrator's setting aside of a share of the estate for the missing heir B did not amount to an admission by the other heirs, or to evidence that B was then alive.

*Mazhar Ali v. Budh Singh*, (1884) I.L.R. 7 All., 297; *Rango Balajec v. Mudiyeppa*, (1898) I.L.R. 23 Bom., 296; followed.

This was an appeal from a judgment of the Chief Court on its Appellate Side. The following judgment of the Chief Court (Sir Herbert Thirkell White, Chief Judge, and Mr. Justice Fox) was delivered on 12th August 1902 by—

*Thirkell White, C.J.*—The plaintiff-appellant is the son of Moolla Ahmed, who was the son of Moolla Hashim. Moolla Ahmed disappeared in the year 1870, or thereabouts, and has not since been heard of. Moolla Hashim died in the year 1884. After some litigation, the persons interested agreed to refer the distribution of Moolla Hashim's estate to Moolla Ismail, who gave an award in 1888, distributing the estate among the heirs and otherwise. He assigned a share to Moolla Ahmed, the eldest son of the deceased. Moolla Cassim claims this share as the sole surviving heir of Moolla Ahmed, whom he asserts to have been alive at the time of Moolla Hashim's death, and to have died since that date.

An attempt was made to prove that Moolla Ahmed had been seen and heard of since his disappearance in 1870. The Court of first instance found that this was not proved; and though this finding was objected to in the memorandum of appeal the point has not been pressed in argument before us. I think that the finding of the learned Judge on the Original Side, that the evidence as to Moolla Ahmed having been seen since 1870, and as to letters having been received from him, is of no value, is fully justified. It may be taken that Moolla Ahmed has not been heard of since 1870.

Civil 1st  
Appeal  
No. 38 of  
1902.

August 12th,  
1902.

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MOOLLA  
CASSIM BIN  
MOOLLA  
AHMED  
v.  
MOOLLA  
ABDUL  
RAHIM.

It is objected that there was a family arrangement whereby the question of the distribution of the estate was left to Moolla Ismail; that his award assumes that Moolla Ahmed was alive in 1884, or even at the time of the award in 1888; and that the defendants are estopped from denying this fact. Even if there is no estoppel, it was urged that the award was evidence that Moolla Ahmed was alive at the time when the award was made. I do not think that either of these propositions can be accepted. There does not seem to be any authority for the contention that the defendants are estopped by the award of 1888. The award does not affirm that Moolla Ahmed was alive. It proceeded, doubtless, on the rule of Mahomedan Law enunciated in Mr. Justice Amir Ali's work\* that "when a person dies leaving certain heirs, one of whom is missing, the division would be made after excluding the share of the missing person." The effect of the award was to recognize that Moolla Ahmed was missing, and to set aside his share until he should be found, or be proved or declared by competent authority to be dead. I am unable to see how this can be regarded as an admission on the part of the other heirs, or as a finding by the arbitrator, that Moolla Ahmed was then alive. Nor do I see how it can be evidence of that fact.

In order to succeed, Moolla Cassim must show that his father Moolla Ahmed is dead now and was alive in 1884. The case is governed by the provisions of the Evidence Act, as was held in the case of *Mazhar Ali v. Budh Singh* (1). Moolla Ahmed had not been heard of for more than seven years—in fact for more than thirty years—before the date of institution of the suit. Therefore the burden of proving that he was alive on that date was on the person, if any, who affirmed it. In other words, failing any proof to the contrary, the fact that he was dead at the time of the suit would be presumed. But as was pointed out in *Rango Balaji v. Mudiyeppa* (2), though the presumption is that Moolla Ahmed is now dead, there is no presumption as to the date of his death. "If it is necessary to establish the exact date of his death, he upon whom the *onus* of establishing that date is cast must establish it or otherwise he must fail." That is to say, because Moolla Ahmed had not been heard of for seven years before the date of his father's death in 1884, there is no presumption that he was dead on that date. On the other hand, the same principle applies to the presumption of continuance of life under section 107 of the Evidence Act; and the fact that Moolla Ahmed had been alive within thirty years before the date of his father's death does not justify the presumption that he was still alive on that date. Neither section 107 nor section 108 of the Evidence Act refer to the question whether a man was alive or dead on a specified prior date. Each section refers only to the case where the question is whether a man is alive or dead, not whether he was alive or dead at some previous time. There is, therefore, no presumption in this case that Moolla Ahmed is alive, or that he was dead on the date of his father's death in 1884. The

\* 2 Mahomedan Law, 91.

(1) (1884) I.L.R. 7 All., 297. | (2) (1898) I.L.R. 23 Bom., 296.

question resolves itself into one of the burden of proof. The burden of proving that Moolla Ahmed was alive on the date specified was on the plaintiff-appellant, who affirmed it. He failed altogether to discharge the burden by shewing affirmatively that Moolla Ahmed was alive on that date. His suit therefore could not succeed.

For these reasons I would dismiss this appeal with costs.

Fox, J.—I concur.

The judgment of their Lordships of the Privy Council was delivered on the 26th July 1905 by—

*Sir Andrew Scoble.*—Moolla Hashim, a wealthy Mahomedan resident at Rangoon, on the 13th of May 1878 executed a will by which (*inter alia*) he bequeathed certain property to his eldest son Moolla Ahmed and his two children. After the death of Moolla Hashim, which occurred on the 27th of January 1884, while he was on pilgrimage to Mecca, one of his widows, named Shareefa Bee, disputed the validity of the will, as not being in accordance with Mahomedan Law, and it was ultimately referred to one Moolla Ismail, as arbitrator, to divide the property among those whom he should find entitled to share in it. He made his award on the 21st February 1888, and in it he included Moolla Ahmed and his children among "the heirs and legatees" among whom the estate of the deceased was to be distributed.

It is a well-known principle of Mahomedan Law that if any of the children of a man die before the opening of the succession to his estate, leaving children behind, these grandchildren are entirely excluded from the inheritance by their uncles and aunts. In the present case, Moolla Cassim, the only son of Moolla Ahmed, claims a share in his grandfather's estate, in right of his father, under Moolla Ismail's award. In his plaint he states that he "is informed and verily believes that the said Moolla Ahmed left Rangoon in or about the year 1870 as a mendicant or fakir, and has not since that date returned to Rangoon"; that he last heard of him in or about the year 1886 or 1887, when he was reported to be in Bangkok, Siam; that he has not since been heard of "and, according to the presumption of law, his death took place about 1894." The defendants are the surviving executors and heirs of Moolla Hashim, or the legal representatives of such of them as have died since his death, and they allege in their written statement that Moolla Ahmed "has never been heard of since his disappearance in the year 1870," and they submit to the judgment of the Court whether he may "now be considered as dead."

Both Courts in Burma held that the plaintiff had failed to prove that Moolla Ahmed had been either seen or heard of after 1870, and that under the provisions of section 108 of the Indian Evidence Act, 1872, the burden was on him to establish that his father and survived his own father Moolla Hashim. They accordingly dismissed the suit with costs. These concurrent findings would ordinarily have sufficed to dispose of this appeal, but it was argued before their Lordships that the Courts below had failed to give proper effect to the circumstances of the reference to Moolla Ismail and to the terms of his award, both

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MOOLLA  
ABDUL  
RAHIM.

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1902.

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CASSIM BIN  
MOOLLA  
AHMED  
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MOOLLA  
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RAHIM.

of which, it was said, postulated that Moolla Ahmed was alive at the date of those transactions, and that he had therefore survived his father. The first observation that their Lordships have to make upon this contention is that the arbitrator was not called as a witness, though living at Mandalay, nor was he examined upon commission; secondly, that the agreement of reference has not been produced, and there is nothing to show that Moolla Ahmed was a party to it; and in the third place, there is nothing in the terms of the award that can properly be construed as evidence that Moolla Ahmed was alive when the award was made. It is true that the award states that "the deceased left six sons and five daughters," but it would be unwarrantable to treat an uncorroborated statement of this kind as proof that the arbitrator had satisfied himself that all Moolla Hashim's children were still living. It is true also that the arbitrator in his award reserved a share for Moolla Ahmed and his children, but this is quite intelligible on the ground that according to Mahomedan Law, a share ought to be reserved for a missing heir. Their Lordships agree with the Chief Court in the opinion that "the effect of the award was to recognize that Moolla Ahmed was missing, and to set aside his share "until he should be found, or be proved or declared by competent authority to be dead"; and their Lordships are, with the Chief Court, unable to see how the proceedings in the arbitration "can be regarded as an admission on the part of the other heirs; or as a finding by the arbitrator, that Moolla Ahmed was then alive."

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed and the judgment of the Chief Court confirmed. The appellant must pay the costs of the appeal, including the costs of the appellant's petition for leave to file additional evidence.

Before Mr. Justice Hartnoll.

H. A. GARSTIN v. KING-EMPEROR.

Dawson—for applicant.

*Hackney-carriage—Offer of carriages for hire—Advertisement—Passenger—Hackney-carriage Act, 1879, ss. 2, 3, 7.*

The accused published an advertisement to the effect that certain carriages might be had on hire or for sale on application being made to him. He was prosecuted under section 7 of the Hackney-carriage Act for offering hackney-carriages for hire without a license as required under a Municipal rule made under section 3 of the Act, and was convicted. The conviction was based merely on the fact of publication of the advertisement and the fact that the accused had no license.

*Held*,—that the conviction was bad as there was no proof that the accused actually possessed the carriages mentioned in the advertisement.

*Held, further*,—that, regard being had to the meaning of the word "passengers" used in the definition of hackney-carriage in section 2 of the Act, and in the absence of anything to show on what terms the accused intended to let out the carriages for hire, he could not be convicted of an offence under the Act, even if he were proved to have possessed the carriages.

*Bateson v. Oddy*, (1874) 43 L.J., M.C., 131, followed.

H. A. Garstin has been convicted under section 7 of the Hackney-carriage Act (XIV of 1879) in that he offered for hire hackney-

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carriages without obtaining a licence from the Rangoon Municipality in contravention of Rule 1 of the Rules framed by the Rangoon Municipal Committee under section 3 of the said Act, published under Municipal and Local Department Notification No. 99, dated the 20th December 1904.

The evidence against him was that he inserted into a newspaper the following advertisement :—

"To hire or for sale. With or without pony, a light office gharry, 4-seated Victoria, 2-seated low Dog-cart and 4-seated Ralli cart, all rubber tyres nearly new. Apply H A. Garstin, 26, Judah Ezekiel Street"

On revision it was urged that this was the only evidence on which he was convicted and that it was never proved that he actually possessed any carriages. This contention appears to be correct, and it seems to me that the conviction cannot be upheld in that it was not proved that the accused had carriages in his possession to which it might be held that the advertisement referred. The mere insertion of a notice is not sufficient for a conviction. It must be proved that the accused has a hackney-carriage before he can be convicted of a breach of the Rules.

Secondly it is contended that, supposing the accused had the carriages referred to in the advertisement, he would not be punishable in that it is not proved that they were hackney-carriages within the meaning of the Act. Certain English cases have been quoted to me ; but I am of opinion that in defining the meaning of a hackney-carriage in this country we are bound by the words used in the Act. Those words are :—

"'Hackney-carriage' means any wheeled vehicle drawn by animals and used for the conveyance of passengers, which is kept, or offered or plies, for hire."

The test to be applied in this case, supposing that Garstin did possess the carriages he advertised, seems to me to be whether he meant them to be used for the conveyance of passengers within the meaning of the definition, as by the advertisement he did offer for hire wheeled vehicles drawn by animals. The Hackney-carriage Act was evidently enacted for the regulation and control of carriages that are kept and used for the general accommodation of the public, and its object should in my opinion be kept in mind in deciding what the words "conveyance of passengers" in the definition means. I am of opinion that it should be taken to mean for the conveyance generally of that portion of the public who are "passengers." It seems to me that, if one person lets to another his horse and carriage for a fixed period, it does not necessarily become a hackney-carriage. Its owner may hire it to another person without using it generally for the conveyance of that portion of the public who are passengers. Lush, J., in the case of *Bateson v. Oday* (1), held that the test is whether the carriage is held out for the general accommodation of the public.

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(1) (1874) 43 L.J., M.C., 231.



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These words, I think, also apply where the Hackney-carriage Act is in force.

Moreover, if I job a horse and carriage from a livery stable-keeper on a year's agreement and have the exclusive use of it, I doubt that, when in it, I am a passenger at all in the ordinary use of the word. It is difficult to define the word "passenger." In Wharton's Law Lexicon, Sixth Edition, passengers are defined as persons conveyed for hire from one place to another. This does not seem to be an exhaustive definition, for surely if a person is given a free passage on a steamer he is nevertheless a passenger. To me the word seems to convey the meaning of being conveyed for a definite journey, and I do not think that it can be applied when a person has the exclusive use of a conveyance for a long period. For the above reasons it seems to me that even supposing Garstin was proved to have possessed the horses and carriages he advertised, his advertisement does not constitute an offence under the Hackney-carriage Act.

It is not shown that he meant to offer his carriages for the conveyance generally of that portion of the public who are passengers, nor is it clear what would be the terms and conditions of the hiring.

I therefore set aside the conviction and direct that the fine be refunded to him.

Before Mr. Justice Hartnoll.

GOBALU v. PO HLA.

Agabeg—for applicant. | Respondent in person.

*Mortgage decree—Execution of decree—Attachment of property—Application for removal of attachment—Civil Procedure Code, ss. 278, 283.*

It is not necessary for the holder of a mortgage decree to attach the property which forms the subject of the decree. Where such property had been unnecessarily attached by the decree-holder it was held that an application for removal of the attachment, under section 278 of the Code of Civil Procedure, could not be admitted.

*Deefholts v. Peters*, (1887) 1 L.R. 14 Cal., 631, followed.

In the year 1903 Piche by his agent Gobalu obtained a mortgage decree against Maung Pan Kaing, Maung Kaung and others with respect to certain land of which the piece in dispute forms a part. In execution of that decree Gobalu attached the land in dispute and asked that it be sold. It was not necessary for him to attach it as he obtained a mortgage decree. He should have asked that his mortgage decree be executed. The land having been attached, Maung Po Hla applied for the removal of the attachment on the ground that he bought the land from Maung Kaung on the 15th April 1904. Maung Kaung was one of the defendants in Piche's suit. Maung Po Hla bought it, according to his own story, after the mortgage decree had been passed. Gobalu states that he cannot now bring a suit under section 283 of the Civil Procedure Code as he has already established a lieu on the land by virtue of his mortgage decree—a decree that was passed against Maung Po Hla's predecessor in interest.

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It seems to me that the execution of the mortgage decree should be proceeded with and that Maung Po Hla should be left to take such proceedings and action as he may think fit. Gobalu has complicated matters by taking out an attachment when such was not necessary. Section 278 of the Civil Procedure Code is not applicable in the case of properties the subject of a mortgage decree. At was laid down in the case of *Deefholls v. Peters* (1) in a case like this the remedy is not by claim under section 278 but is either by regular suit to establish a right to the property or by resistance to the purchaser or the mortgagee or other person who would be put in possession of the property.

I declare the proceedings already taken under section 278 of the Civil Procedure Code void and of no effect, set aside the order passed in Execution Case No. 427 of 1905 of the Township Court, Pyu, and direct that the Judge do proceed with the execution of the mortgage decree against the land in dispute. As Gobalu has erred in asking for an attachment I allow him no costs.

Before Mr. Justice Irwin, C.S.I.

MAUNG PE v. MA BAW.

Pennell—for appellant. | Villa—for respondent.

*Mortgage decree—Suit for redemption—Application for possession—Execution of decree—Limitation Act, 1877, Schedule II. Articles 178, 179—Transfer of Property Act, 1882; ss. 89, 93—Code of Civil Procedure, Schedule IV, Forms 128, 129.*

An application by the mortgagee, on payment of the amount due, to be put in possession of mortgaged property under the decree passed in a suit for redemption is not an application for execution of a decree within the meaning of Articles 179 of Schedule II of the Limitation Act, and is not governed by any of the provisions of that Act.

Such an application should not be in the form prescribed in section 235 of the Code of Civil Procedure. It should be filed in the record of the suit.

*Thakur Prasad v. Fakir-Ullah*, (1894) I.L.R. 17 All. 106; *Narayana Nambi v. Poppi Brahmani*, (1886) I.L.R. 10 Mad., 22; *Chintaman Damodar Agashe v. Balshastri*, (1891) I.L.R. 16 Bom., 294; *Sasivarna Tevar v. Arulanandam Pillai*, (1897) I.L.R. 31 Mad., 261; *Puran Chand v. Roy Radha Kishen*, (1891) I.L.R. 19 Cal., 132; referred to.

*Tiluck Singh v. Parsotein Proshad*, (1895) I.L.R. 22 Cal., 924; *Pramatha Chandra Roy v. Khetra Mohan Ghose*, (1902) I.L.R. 29 Cal., 651; *Hatem Ali Khundkar v. Abdul Gaffur Khan*, (1903) 8 C.W.N., 102; followed.

On the 25th July 1901 Ma Baw obtained a decree against Maung Pe for redemption of certain paddy land and a house and site for Rs. 1,800 (Civil Regular No. 18 of 1901 of the Subdivisional Court of Pegu). The decree is not correctly worded as it does not specify the time within which the redemption money was to be paid.

On the 2nd August 1901 Ma Baw presented an application (Execution Case No. 34 of 1901) in the form prescribed in section 235 of the Code of Civil Procedure, in which she recites that she has this date paid Rs. 1,800 into Court, and prays that the property be delivered to her. The Rs. 1,800 were paid into Court the same day. The order on that application was, "Let possession of the land be given to decree-

(1) (1887) I.L.R. 14 Cal., 631.

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holder within fifteen days." The same day a formal warrant was issued to the bailiff to give possession of the land.

On the back of this warrant the bailiff reported to the District Judge that the same property was proclaimed by the District Court to be sold on 16th August in Civil Execution Case No. 1 of 1901. On this the District Judge wrote: "Till attachment in this case is removed it cannot be made over to Ma Baw." This was dated the 5th August 1901. The Judge of the Subdivisional Court then wrote on the diary: "Read order of District Judge. Let it be kept pending result of case in District Judge's Court." On the 25th August 1902 his successor wrote: "I have heard that this decree-holder has lost the case about this land in the District Court. There is no occasion to give possession of the land. Let the case be struck off."

The history of the attachment and Ma Baw's action in respect to it is this: Maung Shwe Bo obtained a money decree against Maung Pe in Civil Regular No. 1 of 1901 of the District Court and in execution of this decree attached the property in Execution Case No. 1. Ma Baw objected, and her objection was dismissed on the 27th June 1901 (Miscellaneous No. 24 of 1901). On the 12th August 1901 she instituted suit No. 3 in the District Court for a declaration of her right to the property. It was dismissed on the 30th June 1902. She appealed to the Chief Court, and on the 13th May 1903 the suit was remanded for disposal on the merits. On the 25th June 1904 the suit was decided in Ma Baw's favour, and the appeal of Maung Shwe Bo's widow to the Divisional Court was dismissed on the 14th November 1904. A second appeal to the Chief Court was dismissed on the 27th April 1905.

The next day, 28th April 1905, Ma Baw presented to the District Court (the Subdivisional Court having been abolished) an application in the form prescribed in section 235, Civil Procedure Code, in which she recited what had been done in Execution Case 34 of 1901, and prayed that possession of the property might be given to her (Execution 135 of 1905). Notice was issued to the respondent under section 248, and on the 12th May 1905 the application was rejected as time barred.

Ma Baw appealed to the Divisional Court and was successful, the learned Judge holding that the order of the 25th August 1902 was made without notice to either party, and was therefore void. The application of 1905 was treated as a continuation of the former one which was still pending. Under the orders of the Divisional Court Ma Baw has obtained possession of the property.

Maung Pe appeals on the ground that the application to the District Court was barred by limitation. I was referred to the following decisions in support of the appeal:—*Thakur Prasad v. Fakir-Ullah* (1), *Narayana Nambi v. Poppi Brahmani* (2), and *Chintaman Damodar Agashe v. Balshastri* (3). The first seems to me to have no application to the present case; the question whether an application for execution can be regarded as a continuation of an earlier application

(1) (1894) I.L.R., 17 All., 106. | (2) (1886) I.L.R. 10 Mad., 22.  
(3) (1891) I.L.R., 16 Bom., 264.

for the same purpose was not raised at all. The Bombay decision is against the appellant. The Madras decision, I think, conflicts with the later decision of the same Court cited by the Divisional Judge, *viz.*, *Sasivarna Tevar v. Arulanandam Pillai* (4), but the latter is much more nearly on all fours with the present case, and I should hold that the Divisional Judge's decision was right if I thought that Ma Baw's application was governed by the Limitation Act at all, but I do not think so.

In *Tiluck Singh v. Parsotein Proshad* (5) the Calcutta High Court, agreeing with earlier decisions of the Courts at Bombay and Allahabad, held that Article 178 of the Limitation Act was limited to applications under the Code of Civil Procedure, and that consequently it does not apply to an application under section 89 of the Transfer of Property Act for an order absolute. It is remarkable that it was not even suggested that Article 179 could apply. In other words, the application was not regarded as one for execution of a decree. This latter point was definitely decided in *Pramatha Chandra Roy v. Khetra Mohan Ghose* (6), where it was held that proceedings under section 89 of the Transfer of Property Act are not proceedings in execution of the decree, but are proceedings in continuation of the original suit. This view was reaffirmed in *Hatem Ali Khundkar v. Abdul Gaffur Khan* (7). In *Puran Chand v. Roy Radha Kishen* (8) a Full Bench of the Calcutta High Court held that a decree granting mesne profits in accordance with section 211 or 212, Civil Procedure Code, is in the nature of an interlocutory order, that an application to ascertain the mesne profits under such a decree is not an application for execution, and that neither Article 172 nor 179 applied to such an application.

In some of these decisions the learned Judges referred to the preamble to the Limitation Act, "Whereas it is expedient to amend the law relating to the limitation of suits, appeals, and certain applications to Courts." The expression "certain applications" was part of the basis of the rulings that the second schedule does not refer to any applications except applications under the Code of Civil Procedure.

A preliminary decree in a redemption suit is exactly similar in its nature to a preliminary decree for sale under a mortgage. The Code of Civil Procedure is silent about such suits, and both where the Transfer of Property Act so in force and where it is not in force preliminary decrees in such suits and the proceedings subsequent to such decrees are not governed by the Code except that forms 128 and 129 are to be used, under section 644, with such variation as the circumstances of each case require. There is no section in the Code under which an application for possession under a decree for redemption could be made.

There is a further reason for thinking that an application such as Ma Baw made is not governed by the Limitation Act. If the decree had been properly framed she would be barred from redemption after

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(4) (1897) I.L.R. 21 Mad., 261.

(6) (1902) I.L.R. 22 Cal., 631.

(5) (1895) I.L.R. 22 Cal., 924.

(7) (1903) 8 C.W.N., 102.

(8) (1891) I.L.R. 19 Cal., 132.

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a time specified in the decree itself. If the decree gave her only six months to pay, it would be idle to say that Article 179 would bar her after three years. And this consideration applies with even greater force in places where the Transfer of Property Act is not in force. In such a place the Court has a wider discretion as to time for payment. If the Court allowed five years the order would be unusual, no doubt, and would probably be improper, but I do not think it could be called illegal, and so long as it was not modified on appeal the plaintiff would have five years in which to find the money, in spite of anything in the Limitation Act.

I therefore find that neither Ma Baw's first application of the 2nd August 1901 nor her second application of the 28th April 1905 was an application for execution of a decree, and I find that those applications are not governed by the Limitation Act. Those applications need not have been in the form prescribed in section 235, which is altogether unsuitable for them, and they ought to have been filed on the record of the suit, not in execution proceedings.

The appeal is dismissed with costs. Advocate's fee three gold mohurs.

Civil 1st  
Appeal  
No. 69 of  
1906.

Feb. 20th,  
1907.

Before Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

BA PE v. MA MA.

J. R. Das—for appellant (plaintiff). | Burn—for respondent (defendant).

*Contract of sale of incumbered property—Undisclosed incumbrance—Conveyance—Specific performance—Specific Relief Act, 1877 s. 18 (c)—Transfer of Property Act, 1882, ss. 55 (1) (g), 55 (5) (b), 57.*

A contracted to sell a piece of land to B without disclosing the existence of a mortgage on it. A failed to furnish particulars sufficient to enable B to prepare a conveyance. B therefore sued A to compel him to execute a conveyance or, in the alternative, for damages for breach of contract.

*Held*,—that under section 18 (c) of the Specific Relief Act B was entitled to a decree for specific performance of the contract of sale, and that if A did not pay off the mortgage before executing the conveyance, B was entitled, under section 55 (5) (b) of the Transfer of Property Act, to retain out of the purchase-money the amount payable to the mortgagee.

*Ayesha Bee v. V. Somasundram Iyer*, 11 Bur. I.R., 257, referred to.

*Irwin, J.*—In July 1904 the defendant-respondent contracted to sell to the plaintiff a certain plot of land, part of a larger plot, for Rs. 3,000. Plaintiff paid Rs. 200 earnest, and subsequently Rs. 600 more. Defendant neither executed a conveyance nor gave the plaintiff sufficient particulars to enable him to prepare a conveyance.

Plaintiff sued to compel defendant to execute a conveyance, or in the alternative, for return of the Rs. 800 paid and for Rs. 2,000 as damages for breach of contract.

The learned Judge on the Original Side found all the facts in favour of plaintiff.

The land was mortgaged to one Maung Thein Maung for Rs. 500 and this fact was not disclosed when the oral contract for sale was made. The existence of this mortgage prevented the defendant from producing the title deeds. Plaintiff's advocate, however, obtained a

perusal of the title deeds from the mortgagee, and he admits that he is satisfied with the title, but he never obtained a description of the boundaries sufficient to enable him to prepare a conveyance.

Plaintiff was willing to formally admit that he had bought with notice of the incumbrance in order that he might clear off the mortgage in the manner prescribed in the Transfer of Property Act, section 57, but the learned Judge refused to allow him to alter the case he had set up. The position then being that defendant having contracted to sell as unincumbered a property which was in fact incumbered, the plaintiff's prayer for a decree for specific performance was refused on the authority of *Ayesha Bee v. V. Somasundram Iyer* (1), in which Mr. Justice Fox said that in such a case the legal title was not in the vendor, and he was not in a position to transfer what he sold. It was not in the power of the vendors to carry out the contract he had made.

It has been urged before us that the ruling just mentioned is not correct, and that the case is provided for in section 55 (1) (g) of the Transfer of Property Act, and in section 18 (c) of the Specific Relief Act.

The case above cited is not on all fours with the present one. It was a suit for return of the earnest-money and for damages. In the present suit the plaintiff has got a decree for the earnest-money, but he wants a decree for specific performance of the contract. Moreover, I am authorized by the learned Chief Judge to say that when he decided the case of *Ayesha Bee* (1) his attention had not been drawn to section 18 (c) of the Specific Relief Act.

In my opinion that enactment decides the point at issue without any doubt. The plaintiff is entitled to a decree for specific performance of the contract for sale, and, under section 55 (5) (b) of the Transfer of Property Act, he is entitled to retain out of the purchase-money the amount payable to the mortgagee if the defendant does not pay off the mortgage before executing the conveyance.

Respondent urged that the findings of fact by the learned Judge on the Original Side are not correct. There were three issues of fact. The first issue, "Did plaintiff buy with notice of Maung Thein Maung's mortgage," is immaterial if my view of the law is correct. Plaintiff is entitled to a conveyance of the land unencumbered, whether he had notice of the mortgage or not.

On the second issue, whether plaintiff agreed to complete within three months, the defendant's statement is unsupported, and it is clear that long after three months had elapsed defendant treated the contract as if there were no such time limit.

On the third issue, whether completion was delayed by defendant failing to give particulars of title, it is quite plain that defendant has never supplied plaintiff with any particulars at all, except a plan which admittedly does not show the boundaries of that part of the land which defendant contracted to sell. It is therefore impossible for plaintiff to prepare the conveyance.

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(1) 11 Bur. L.R., 257.

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I would therefore set aside the decree, and would direct that defendant do furnish plaintiff with sufficient particulars for the preparation of the conveyance, and do execute the conveyance of the land in suit on payment of Rs. 2,200, less such amount as may be due on the mortgage to the mortgagee, Maung Thein Maung, on the day on which the conveyance is signed. Plaintiff's costs of the suit and appeal to be paid by defendant.

Hartnoll, J.—

Special Civil  
d Appeal  
o. 119 of  
1906.

Before Mr. Justice Hartnoll.

KYA GET v. BU NWE.

S. S. Patter— for appellant (defendant). | S. N. Sen—for respondent (plaintiff).  
Suit to establish right to attach property—Bar to suit—Consequential relief—  
Code of Civil Procedure, s. 283—Specific Relief Act, s. 42.

Feb. 21st,  
1907.

The proviso to section 42 of the Specific Relief Act does not apply to suits brought under section 283 of the Civil Procedure Code.

*Ma Dun v. Ma Pa U*, 2 L.B.R., 124, distinguished.

Ma Bu Nwe and Maung Po San obtained a decree against Po Ne and another for Rs. 397 and costs Rs. 55-6-6 in the Township Court, Pyu, and in execution of it attached certain paddy which they alleged to belong to Po Ne. Maung Kya Get applied for removal of attachment and obtained an order to remove the attachment on 90 per cent. of the paddy. This suit is accordingly brought by Ma Bu Nwe and Maung Po San against Maung Kya Get to establish their right to attach the paddy. The Township Judge dismissed it; but the District Judge found in favour of the plaintiffs and declared that at the date of the attachment the attached paddy was the property of the judgment-debtor Po Ne and that no other person had any interest therein. This decision is now appealed against.

\* \* \* \* \*

Lastly it was urged that, as consequential relief was not asked for, the suit must fail, and the case of *Ma Dun v. Ma Pa U* (1) was cited. That case was decided under section 42 of the Specific Relief Act. This suit was not brought under Act but under section 283 of the Code of the Civil Procedure, which says nothing about consequential relief. Since this is so, I hold that the provisions of section 42 of the Specific Relief Act do not apply.

I accordingly dismiss the appeal with costs.

Civil 1st  
Appeal  
o. 55 of  
1905.

Before Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

MAUNG KYAW AND MA SAN HMWE v. SITHAMBARAM  
CHETTY.

Pennell—for appellants (defendants).

Lentaigne and Higinbotham—for respondent (plaintiff).

March 4th,  
1907.

Suit to enforce registration—Invalid registration—Time limit—Mortgage deed—  
Admissibility in evidence—Bar to oral evidence—Personal undertaking—  
Agreement to repay loan—Indian Registration Act (1877), ss. 17, 23, 34, 49, 73,  
77—Indian Evidence Act (1872), s. 91—Transfer of Property Act (1882), s. 86.

In December 1901 A borrowed money of B and executed a mortgage deed of certain land in B's favour.



In January 1902 B instituted a suit praying, *inter alia*, for an order to the Sub-Registrar to register the deed. In June 1903 he obtained a decree directing that the deed should, on application, be registered whether A admitted execution and receipt of consideration or not.

The deed was registered in accordance with this decree in July 1903.

The present suit was brought by B for sale of the mortgaged property and was based on the mortgaged deed in question.

*Held*,—that the former suit not having been brought under the conditions required for the filing of a suit under section 77 of the Indian Registration Act, the decree therein had no value as exempting the document registered under it from the necessity for compliance with all other provisions of the Act. The Court had power to decide as to the validity of the registration, and as the document was not registered in accordance with the provisions of sections 23 and 34 of the Act, it could not, under section 49, be received in evidence as affecting the mortgaged property. At the same time section 91 of the Evidence Act precluded B from proving the existence of the mortgage by any other evidence.

*Held, further*,—that as the deed contained a distinct agreement to repay the money borrowed, it was admissible as the basis of a personal money decree for the amount due.

*Bhagwan Singh v. Khuda Buksh*, (1881) I.L.R. 3 All., 397; *Edum v. Makomed Siddik*, (1882) I.L.R. 9 Cal., 150; *Petherpermal Chetty v. Mooniandy Servai*, 11 Bur. L.R., 166; *Chattar Mal v. Thakuri*, (1898) I.L.R. 20 All., followed.

*Ram Gjulam v. Chotey Lal*, (1878) I.L.R. 2 All., 46; *Abdullah Khan v. Jauki*, (1894) I.L.R. 16 All., 303; *Sah Mukhun Lal Panday v. Sah Koondun Lal*, (1875) L.R. 2 I.A., 210; *Sreemutty Matonginy Dossee v. Ramnarian Saikhhan*, 2 C.L.R., 428 referred to.

*Irwin, J.*—Plaintiff-respondent sued on a registered mortgage deed of agricultural land, dated the 13th December 1901, and registered on the 20th July 1903. He prayed for a sale of the mortgaged property and so forth.

On the 27th December 1901 the defendants, or one of them, took the deed away from plaintiff's house without his consent, and handed it shortly afterwards to the Deputy Commissioner, apparently with a complaint that the execution of the deed had been obtained by fraud. It is not alleged by either party that the Deputy Commissioner took any action on this complaint.

On the 4th January 1902 defendants instituted suit No. 1 of 1902 for cancellation of the deed, alleging that the execution of it had been obtained by fraud.

On the 6th January 1902 plaintiff instituted suit No. 2 of 1902, praying, *inter alia*, for an order to the Sub-registrar to register the deed.

These cross-suits were tried together, and decided on the 15th June 1903. No. 1 was dismissed, and in No. 2 plaintiff obtained a decree in these terms :—

"That defendants do perform their part of the contract in registering Exhibits I and II by appearing within one month after date of decree before the Sub-Registrar of Wakema and admitting execution of Exhibits I and II and receipt of consideration therefor; and that the Sub-Registrar, Wakema, do on application register the deeds, Exhibits I and II, whether the signatories admit execution and receipt of consideration or not."

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This decree was not appealed against. Appellants appealed against the decree in suit No. I, but the appeal was dismissed for default on the 16th June 1904.

On the 13th July 1933 plaintiff applied to the Court to return the deed to him in order that he might present it for registration. The same day it was ordered to be returned to him.

On the 20th July 1933 the deed was presented for registration, and it was registered the same day; the Sub-Registrar quoting the District Court's Order No. 1684, dated the 15th July 1933, in Civil Regular No. 1 of 1932.

This order is an endorsement forwarding to the Sub-Registrar a copy, not of the decree, but of the order in the joint judgment, on which the decree in suit No. 2 was based.

It will be remarked that the deed was not presented for registration within the 30 days within which the decree directed the defendants to appear and admit execution. It is also remarkable that the part of the order which relates to registering the deed, whether the signatories admit execution or not, was added to the judgment on the 14th July, 29 days after the judgment had been signed and pronounced.

On the 3rd March 1904 the respondent instituted the present suit for sale under the mortgage.

Five issues were framed, viz. :—

- (1) Is the question whether defendants executed the deed, Exhibit I, for consideration *res judicata* ?
- (2) Is the question whether they were induced to sign the deed by a fraudulent representation that it was part of another deed *res judicata* ?
- (3) If these two issues are decided in the affirmative, is the Court bound to take notice of the fact apparent from the Sub-Registrar's certificate that the deed was presented for registration after the period allowed by law ?
- (4) If the last issue is decided in the affirmative, ought the Court to take that the deed was duly registered ?
- (5) If it was not duly registered, is the Court justified in granting a decree as prayed on the finding that the contract of mortgage was entered into by defendants, and that the making of the contract being *res judicata* need not be proved ;

The first two issues were found in the affirmative, i.e., in favour of the plaintiff.

The judgment contains no finding of any kind on the 3rd and 4th issues. They were not considered at all. It must be admitted that this would make no difference if the finding on the 5th issue were correct. The finding is this, " by virtue of the decision in the suit brought by defendants for cancellation of the mortgage deed it is conclusively proved that defendants executed the deed, Exhibit I, for consideration, and that they are bound thereby. It is therefore not necessary to produce it in evidence."

This was not seriously supported by the learned Advocate for the respondents, and it is obviously wrong. The question is not one of

evidence at all. Section 49 of the Registration Act enacts that no document required by section 17 to be registered shall affect any immoveable property comprised therein unless it has been registered in accordance with the Act. Plaintiff sued expressly on the deed, and he could not do anything else, because section 91 of the Evidence Act would preclude him from giving any evidence of the contract except the deed itself. When suing on the deed he cannot fall back on an oral contract antecedent to the deed, nor did he ever venture to allege that a mortgage was actually effected by such an oral contract, and then effected over again by execution of the deed.

As the basis of the decree is bad we have to consider the third and fourth issues; and the bulk of the agreement was directed to these.

The difficulties in plaintiff's way consist primarily of sections 49 and 23 of the Registration Act, which enact that no document required by section 17 to be registered shall affect any immoveable property comprised therein unless it has been registered in accordance with the provisions of the Act, and that subject to certain exceptions no document other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution.

Plaintiff urges in the first place that the deed having been registered by order of the Court we should presume that every necessary preliminary to registration was duly performed, and that the presentation of the document by the defendants to the Deputy Commissioner in December 1901 should be held to have been presentation to the proper officer for the purpose of registration because the Deputy Commissioner happens to be also Registrar of Deeds, and he could receive and register the deed under section 30, notwithstanding that under section 28 the proper officer is the Sub-Registrar of Wakema. To my mind this argument carries its own refutation on the face of it. The defendants were straining every nerve to get the deed cancelled. To that end they ran the risk of a criminal prosecution for theft. A few days later they instituted a suit for its cancellation. To say that we should assume that those persons brought the deed to the Deputy Commissioner for the purpose of registration is grotesque, and I at any rate decline to presume anything of the sort. The plaintiff certainly never alleged anything of the kind in suit No. 2.

In the next place plaintiff says that defendants are bound by the decision in suit No. 2 of 1902, which was not appealed against and that such a suit lies independently of section 77 of the Registration Act. There is authority for this view in *Ram Gulam v. Choley Lal* (1), and in *Abdullah Khan v. Janki* (2). In these cases there was no proper presentation of the deed to the Sub-Registrar. A full bench of the same Court in *Bhawan Singh v. Khuda Bakhsh* (3) held that where the deed had been presented in time to the Sub-Registrar but no application had been made to the Registrar under section 73, a suit would not lie. In the Calcutta case of *Edun v. Mahomed Siddik* (4)

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(1) (1878) I.L.R. 2 All., 46.

(2) (1894) I.L.R. 16 All., 323.

(3) (1881) I.L.R. 3 All., 397.

(4) (1882) I.L.R. 9 Cal., 150.

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the document had been presented, and the application to the Registrar had been dismissed because time barred. The Court concurred with the Allahabad Full Bench, holding that a suit would not lie, but it went further, and expressly dissented from the view of the law set out in *Ram Ghullam v. Choley Lall* (1), and the reasons given for its decision indicated that a suit to enforce registration independently of section 77 will not lie, whether the document has been presented in time or not. I think this further reason might be added, that if such a suit were maintainable the period of limitation would be six years under Article 120 of the Second Schedule to the Limitation Act. If such a suit were of any use it would reduce the Registration Act to a farce.

The question whether the validity of the decree in suit No. 2 of 1902, not having been contested by appeal, can be contested in this suit, is one which I think need not be discussed, because the decree in suit No. 2, whether it be valid or not, is of no use to the plaintiff. It merely directed that the deed should be registered: it did not, and could not, decide the question whether the deed was in fact subsequently registered in accordance with the provisions of the Act. It is instructive to consider what could be the effect of a decree under section 77, if all the necessary formalities had been carried out and a suit duly instituted under that section. The decree would be that the document be registered if it be duly presented for registration within 30 days after the passing of such decree. Suppose the document were presented, but after the prescribed 30 days, and the Sub-Registrar wrongly accepted and registered it. The decree would not avail to prove that the document had been duly registered.

The value of the decree in suit No. 2 seems to me to be entirely demolished by the very ruling on which plaintiff relies in *Abdullah Khan v. Janhi* (2). Here is what the learned Judges said :—

The Court has to consider in this appeal whether the conduct of the defendant did or did not justify the appellants in requiring her to register a document. The decree, if in favour of the appellants, will make a declaration to this effect. It cannot of course make an order binding on the Registration Department to register the document if, under statutory provisions of the Registration Act binding on Registrars and Sub-Registrars, the registration cannot now be made consistently with the provisions of the Act. All that will be declared will be that the appellant have title as lessees under the *patta* in question to have registration of that deed if not barred by the Registration Act, a matter which will not now come under the judicial decision of the lower Appellate Court in this case.

Our attention was drawn to the case of *Sah Mukhun Lall Panday v. Sah Koondun Lall* (5), in which a document was registered by order of the High Court some two and half years after execution and their Lordships of the Privy Council, while holding that the High Court had no jurisdiction to make the order, yet found the deed to be duly registered. That decision, however, related to Act XX of 1866, and the ground of it is this :—

Though the statute makes it imperative to present an instrument for registration within four months from the date of its execution, no time is fixed within which a deed presented and accepted for registration must be registered.

The deed had originally been registered without the vendors appearing, and that registration was held by the High Court to be invalid. The vendors appeared after two and half years and the deed was registered again. Section 36 of Act XX of 1866 was similar to section 34 of Act III of 1877, but it did not contain the words "within the time allowed for presentation under sections 23, 24, 25 and 26."

For these reasons I think the mortgage deed cannot be accepted as affecting the immoveable property comprised therein, as it was registered in contravention of the plain provisions of sections 23 and 34. It was not presented within the time allowed by law, and the persons executing it never appeared before the registering officer at all.

In *Petherpermal Chetty v. Mooniandy Servai* (6), it was held that section 60 does not make the registering officer's certificate conclusive proof that the document was duly registered, and that the validity of registration is a matter for the determination of the Courts.

But plaintiff says that if the mortgage decree for sale be set aside he should get a decree for the mortgage money against the defendants personally.

Defendants in reply cited section 86 of the Transfer of Property Act and the cases mentioned at pages 101 and 102 of Ghose on the Law of Mortgage.

The case of *Sreenutty Matonginy Dossee v. Ramnarain Sadkhan* (7) is not on all fours with the present case, as the loan was to be repaid on a fixed date, and the method of recovery was described in detail in the deed. *Chattar Mal v. Thakuri* (8) seems to the point, although the question did not arise in the same way as in this suit. The loan was repayable on demand, and in case of the hypothecated property being insufficient the creditors would be at liberty to realize the amount due from the obligers personally. It was held that the bond gave two remedies for a breach, and the plaintiff could have instituted a suit for a personal decree within three years.

In the present case the terms of the deed are : "We undertake to pay in full the principal and interest on demand . . . . If on demand we fail to pay, . . . we shall submit to whatever is done by the creditor with regard to the paddy lands herein mortgaged." In my opinion there is here a distinct covenant pay on demand. There is nothing in the Registration Act to prevent this taking effect and being put in evidence. I think the plaintiff is entitled to a personal money decree.

I would therefore set aside the decree of the District Court, and would give the plaintiff a decree for Rs. 7,660, with interest on Rs. 5,000 at 2 per cent. per month from the date of institution of the suit to the date of the original decree, 24th August 1904, but not further, as I understand the property has been sold under the mortgage decree. I would direct the defendants to pay plaintiff's costs in the suit, and make no order for costs in this appeal.

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(6) 11 Bur. L.R., 166.

(7) 2 C.L.R., 428.

(8) (1898) I.L.R. 20 All., 512.

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 —

I may remark that the proceedings selling the land under the mortgage decree ought to be on the record, but are not.

*Hartnoll, J.*—The first point for decision is whether the document that purports to charge the property was registered in accordance with the provisions of the Registration Act, as unless it was, section 49 of that Act, prevents it from being received in evidence in this case. It bears date the 13th December 1901, and the endorsement on it by the Sub-Registrar of Wakema shows that it was presented for registration by K. A. L. T. Anamale Chetty on the 20th July 1903. It was therefore presented long after the time allowed by sections 23 and 24 of the Act.

The learned counsel for the respondent wishes us to assume that the decree passed in Civil Regular Suit No. 2 of 1902 was one passed in a suit brought under section 77 of the Registration Act, and so that the registration was in order. He emphasizes the fact that every presumption possible should be made against the appellants as they wrongfully took the document out of the custody of the respondent.

It seems to me that in this case the burden of proof lies on the respondent to show that the document he sues on was duly registered in accordance with the provisions of the Act. The former suit he brought, No. 2 of 1902, was entitled: "Claim to order specific performance of contract by ordering registration of two mortgage deeds for Rs. 8,000."

The relief claimed is as follows:—

- "(a) That the said two mortgage deeds with enclosures may be ordered to be produced before this Honourable Court in the present case;
- (b) That the defendants may be made to specifically perform their part of the contract and that the said mortgage deeds may be ordered to be registered by the Sub-Registrar and handed over to the plaintiff;
- (c) That such damages as this Honourable Court may deem fit be ordered to be paid to plaintiff for breach of contract;
- (d) That such further or other relief may be granted to the plaintiff as the nature and circumstances of the case may permit and this Honourable Court may deem fit and meet."

Can this suit be deemed to be one brought under section 77 of the Registration Act? That section states that a suit may be instituted for a decree directing the document to be registered if it is duly presented for registration within 30 days after the passing of such decree.

Section 77 is not mentioned in the plaint, nor is the relief framed in the words of section 77.

The decree runs that the defendants do perform their part of the contract in registering Exhibits I and II by appearing within one month of the date of decree before the Sub-Registrar of Wakema and admitting execution of Exhibits I and II and receipt of consideration therefor, and that the Sub-Registrar, Wakema, do, on application, register the deeds, Exhibits I and II, whether the signatories admit execution and receipt of consideration or not. This decree does not follow the words of section 77.

The decree was dated the 15th June, and the document presented for registration on the 20th July. The interval between the decree and the registration is more than the 30 days allowed by section 77.

I am enabled to hold that the former suit was one brought under section 77 of the Registration Act, and so in my opinion that section must be kept out of consideration in deciding the case. Since I am of the opinion and the document was presented out of time as allowed by Part IV of the Act, I am of opinion that it is not shown to have been duly registered in accordance with the provisions of the Act, and that it is now inadmissible for the purpose of charging the property.

The point remains as to whether a money decree can be passed on it. I am of opinion that it can, as there is a distinct personal covenant in it, that is separate to the portion relating to the mortgage, and that is not dependent on the mortgage in any way and action taken under it.

The passages run : " On demand we undertake to pay in full this sum of Rs. 5,000 (five thousand rupees) together with the interest that shall be due thereon. If on demand we fail, etc." The sentence I have quoted seems to me to be a distinct promise and obligation to pay the principal and interest as apart from a further binding by way of mortgage, and I am of opinion that the respondent is entitled to obtain a simple money decree.

I therefore concur in the order proposed by my learned colleague.

Before Sir Charles Fox, Chief Judge, and Mr. Justice  
Irwin, C.S.I.

A. L. S. P. S. SOOBRAMONIEN | v. { (1) MYAT THA. U.  
CHETTY. | { (2) BA ON.  
| { (3) MA NU FOR HERSELF AND  
| { ALSO AS THE LEGAL REPRESENTA-  
| { TIVE OF THE LATE PO MYAT.

N. N. Burjorjee—for appellant (plaintiff).  
Brown—for respondents (defendants).

*Suit by agent—Wrong person as plaintiff—Substitution of—plaintiff—Appeal—Principal's right of appeal—Code of Civil Procedure s. 27—Indian Contract Act, s. 230.*

A suit was instituted by one Sellappa Chetty, under the style of A. L. S. P. S. Sellappa Chetty. The plaint did not show that Sellappa was not himself the principal, but it transpired in evidence that he was merely the agent of Soobramonien, Chetty, and that the letters A.L.S.P.S. were part of the latter's name. The suit was dismissed on the ground that Sellappa, being merely an agent, could not sue in his own name. Soobramonian appealed to the Chief Court.

*Held*,—that as the suit had been filed in the name of the wrong person by *bona fide* mistake, and as the substitution of the proper plaintiff was necessary for the determination of the real matter in dispute, the lower Court should have substituted Soobramonien as plaintiff under section 27 of the Code of Civil Procedure; and that as action under the action might have been taken at the instance of Soobramonien, he had a right to appeal against the order dismissing the suit. The case was remanded for substitution of the proper plaintiff and for decision on the merits.

*Abdul Karim, v. Pana Mustan*, 1 L.B.R., 191; *Chokalingam Chetty v. Maung Aung Baw*, 1 L.B.R., 350; distinguished.

*Carter v. Misree Lal*, (1870) 2 N.W.P., H.C., 179; *Sardarmal Jagonath v. Pranvayal S. Moodaliar*, (1898) I.L.R., 21 Bom., 205; *Seshamma v. Chennappa*,

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MAUNG  
KYAW  
v.  
SITHAM-  
BARAM  
CHETTY.

Civil 1st  
Appeal  
No. 22 of  
1905.  
March 11th  
1907.



1907. (1897) I.L.R. 20 Mad, 467; *Juggunnath Pershad Dutt v. Hogg*, (1869) 12 W.R., 117; referred to.

A.L.S.P.S.  
SOOBRA-  
MONIEN  
CHETTY.  
v.  
YAT THA U.

*Irwin, J.*—This is a suit on a promissory note, and it was instituted on 14th October 1904. The plaintiff describes himself in the plaint as "A. L. S. P. S. Sellappa Chetty, money-lender, Gyobingauk." The lender is described in the promissory note as "Anna Lana Suna Pana Suna Shalappa Chetty of Letpadan." In the defendants' written statement the plaintiff's name appears as "A. L. S. P. S. Chillappa Chetty."

One issue was fixed on 23rd November. It relates to the consideration for the note. Plaintiff Sellappa or Chellappa Chetty was examined on 20th December; in cross-examination he said, "I am returning to my country . . . No one instructed me to file this suit. I handed over charge of my books a month ago. My agency has ended. I sue as agent of the firm. The money belongs to the firm A. L. S. P. S. I filed the suit before I handed over charge." The examination of witnesses continued on 21st December, and then judgment was reserved; it was delivered on 9th January 1905.

It appears from the judgment that on the cross-examination of the plaintiff the defendant's advocate raised the question: will the suit lie? and the "Plaintiff's counsel had an opportunity of discussing it." The learned Judge said that the plaintiff, who was only an agent of the firm which lent the money, could not sue in his own name, and that it was held in *Abdul Karim v. Pana Mustan* (1) that an objection on this ground was not a mere technical one. He therefore dismissed the suit.

Against that decree A. L. S. P. S. Soobramonien Chetty appeals. The grounds of appeal are not well drawn, and I do not think it is necessary to refer to them in detail. It was admitted after enquiry that Sellappa or Chellappa Chetty had no power-of-attorney from his principal authorizing him to institute a suit or to sign a plaint. What was argued before us was this. Sellappa's principal was the appellant, who has no partners. The letters A.L.S.P.S. are part of his name and not of Sellappa's name. The lower Court was wrong in treating the suit as a suit by Sellappa: it was really a suit by Subramonien instituted for him by his agent. It was at least doubtful whether the suit had been instituted in the name of the right plaintiff, as Soobramonien's initials are in the plaint. The Court ought to have substituted the name of Soobramonien under section 27, Civil Procedure Code, if he was not already one of two plaintiffs.

It is usual among Chetties to use in all business transactions the initials of the prefixes of the names of the principal or principals. The name following the initials is the name of the person who actually makes the loan. He may be principal, or he may be agent, and so far as appears from this record the borrowers had no means, and would ordinarily have no means, of knowing whether he was principal or agent. I do not think it can be held that Soobramonien was in any

(1) 1 L.B.R., 191.

sense a plaintiff merely because his agent affixed the principal's initials to his own name.

If that be so, the first question which arises is : has Soobramonien any *locus standi* to appeal from the decree dismissing Sellappa's suit ? If this be decided in the affirmative, then comes the question whether the lower Court ought to have substituted the name of Soobramonien for that of Sellappa, in the plaint, under section 27 of the Civil Procedure Code.

I do not think the first question can properly be decided without giving some consideration to the second ; for if the lower Court made a mistake it ought to be possible to rectify that mistake, and how can it be rectified without an appeal by the principal who ought to have been the plaintiff ? If the agent were to appeal, he would be met by the answer that as he had no right to sue he can have no right to appeal. Moreover, it is the principal who is mainly damaged by the decree, and he cannot compel his discharged agent to appeal.

I am strongly of opinion that section 27 of the Civil Procedure Code exactly fits the case and that when the lower Court found that Sellappa was only an agent, the Judge ought to have inquired whether Sellappa was expressly or impliedly authorized by power-of-attorney to institute the suit or to sign plaints on behalf of Soobramonien.

On finding that he was not so authorized the Court ought to have given time to enable the principal to come in and apply to be substituted as plaintiff and either to sign the plaint himself or authorize his agent to do so. If the lower Court ought to have done that, it is difficult to say that the error cannot be rectified because appellant not having had any decree pass against him cannot appeal. The action which a Court of first instance takes under section 27 is taken in the interests of a person who is not a party to the suit, and may be taken on the initiative of that person, or of a party to the suit, or of the Court itself. It seems to follow that if such action ought to be, but is not, taken, the person in whose interests it ought to have been taken has as much right to come to a Court of appeal for redress as he had to come to the Court of the first instance. It may be observed that Chapter 41 does not contain any provisions prescribing who has a right to appeal.

I think this view does not conflict with my own ruling in *Chokalingam Chetty v. Maung Aung Baw* (2), for in that case neither in the Court of first instance nor in the Court of first appeal did the agent give any hint that he was not the principal in the transactions ; consequently the lower Courts could not have taken any action under section 27.

In *Abdul Karim v. Pana Mustan* (1) the Court of first appeal passed a decree against the principal. The agent presented a second appeal. This Court held that (a) the agent could not appeal, and (b) an amendment under section 27 could not be allowed. The decisions on these two points do not affect the first question before us now ; the second of them related to amendment of an appeal, not of a

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(2) 1 L.B.R., 350.

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SOOBRAMO-  
NIEN CHETTY  
v.  
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plaint, and I do not think it is an obstacle to the answer I propose to the second question, namely, that the name of Soobramonien ought to have been substituted in the plaint.

We were not referred to any other ruling on the question of Soobramanien's right to appeal. In my opinion he has sufficient *locus standi*.

On the question of substituting the name of the principal for that of the agent in the plaint, the learned advocate for the appellant cited *Carter v. Misree Lal* (3), *Saradarmal Jagonath v. Aranavayal S. Moodaliar* (4), *Seshamma v. Chennappa* (5) and *Juggunnath Pershad Dutt v. Hogg* (6). The first two related to a suit and an application by agents, who, however, were duly empowered by power-of-attorney. The four cases do not throw any more light on the present case than a perusal of section 27 itself. But the section requires no expounding. Its provision are plain. The present suit was instituted in the name of the wrong person as plaintiff. I have no doubt at all that that was done through a *bonâ fide* mistake, a very common mistake in this province, and it is obviously necessary for the determination of the real matter in dispute to order the principle Soobramonien to be substituted as plaintiff with his consent.

I would therefore set aside the decree of the lower Court and remand the case to it, under section 562, Civil Procedure Code, with a direction that the name of Soobramonien Chetty be substituted for that of Sellappa Chetty as plaintiff in the plaint, and that the District Court do then proceed to determine the suit on the merits.

I would make no order for costs.

*Fox, C.J.*—I agree in making the order proposed by my learned colleague.

As regards the decision in *Abdul Karim v. Pana Mustan* (1), I would point out that in that case the appeal to this Court was on the face of the memorandum an appeal preferred by an agent in his own name. The plaint in the present case purported to be the plaint of Sellappa Chetty, and it stated that he lent the money he sued for, and he sought a decree which would have made the defendants liable to pay him what was due under the promissory note sued on. There was nothing on the face of the plaint to indicate that he was merely an agent. This transpired only during the course of the case.

The subject of the suit was a contract entered into by Sellappa or Chellappa without disclosing the name of his principal, and although it was not argued that he could bring the suit in his own name, it appears to me that in view of the provisions of section 230 of the Contract Act it is not clear that he could not do so, and that his plaint was not a proper one. Neither in *Abdul Karim v. Pana Mustan* (1), nor in *Chokalingam Chetty v. Maung Aung Baw* (2), was the suit one to enforce a contract, consequently section 230 of the Contract Act could not be applied in them, as it might be in this case.

(3) (1870) 1 N.W.P. H.C., 179.

(4) (1896) I.L.R., 21 Bom., 205.

(5) (1897) I.L.R., 20 Mad., 467.

(6) (1869) 12 W.R., 117.

As this appeal was argued on other grounds on behalf of the principal, I will not say more on the above point. If the plaint was instituted in the name of the wrong person, I am satisfied that it was so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute that Soobramonien Chetty's name should be substituted for that of Sellappa's evidence on the plaint. His bringing of this appeal is evidence of Soobramonien's consent to such substitution, and Sellappa's evidence shows that he has no personal interest in the subject of the suit.

Under the circumstances I think that the substitution may be directed, and that the suit should be determined by the District Court on the merits.

*Before Sir Charles Fox, Chief Judge.*

K. V. P. L. PERIANEN CHETTY v. ARMUGA PATHER.

A. D. Nariman—for applicant (plaintiff).

A. B. Banurji—for respondent (defendant).

*Partnership—Representatives of deceased partner—Debt due to partners ip--  
Suit by surviving partners—Hindu Law.*

The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrues due to the partnership in the lifetime of the deceased.

*Ram Narain Nursing Doss v. Ram Chunder Jankee Loll*, (1890) I.L.R. 18 Cal., 86, dissented from.

*Vaidyanatha Ayyar v. Chinnasami Naik*, (1893) I.L.R. 17 Mad., 108; *Subramanian Chetti v. Rakku Servai*, (1897) I.L.R. 20 Mad., 232; *Jagmohandas Kila Bhai v. Allumaria Duskal*, (1894) I.L.R. 19 Bom., 338; referred to.

The four plaintiffs Chinaya Chetty, Ramen Chetty, Perianen Chetty and Lutchman Chetty, who described themselves as bankers and money-lenders carrying on business together in co-partnership under the style and firm formerly of K. V. P. L. Pallaneappa Chetty and now under the style and firm of K. V. P. L. Perianen Chetty, sued the defendants to recover what was due on a promissory note executed in favour of K. V. P. L. Pallaneappa Chetty.

One of the defendants took the objection that Pallaneappa Chetty was dead, and that none of the plaintiffs had obtained letters of administration to his estate or a certificate under the Succession Certificate Act.

Thereupon the plaintiffs applied that the widow and daughter of Pallaneappa should be made plaintiffs with them, although they stated that his female relations took no share in his estate. Oblivious of the fact that no one can be made a plaintiff in a suit without his consent, the Judge granted the application without even issuing notice to the widow and daughter. Up to the decision of the suit, however, the names of the widow and daughter had not been entered on the plaint as plaintiffs.

The suit was heard as if they were plaintiffs, and on the objection that no one of the plaintiffs had either letters of administration or a succession certificate, it was held that the plaintiffs were not competent to sue, and accordingly the plaint was rejected. The plaintiffs apply for revision and reversal of this order.

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ARMUGA  
PATHER.

In the first place the order making Pallaneappa's widow and daughter plaintiffs was illegal and I set it aside.

The plaintiffs are as originally stated in the plaint. They admit that Pallaneappa was a partner with them at the time the money, the subject-matter of the suit, was lent, and that it was partnership money. The questions which arise are :—

- (1) Are the plaintiffs as surviving partners competent to sue for the money without Pallaneappa's heirs being co-plaintiffs ?
- (2) Can they sue without having obtained letters of administration or a certificate under the Succession Certificate Act ?

There has been considerable diversity of decision on such points in the High Courts of India.

In *Ram Narain Nursing Doss v. Ram Chunder Jankee Loll* (1) the Calcutta High Court held that the effect of section 45 of the Contract Act was that a deceased partner's representatives must always be made parties to suits as plaintiffs with the surviving partner or partners. At the same time a hesitating opinion was expressed as to the applicability of this rule to the case of a family partnership under the Mitacshara law.

Mr. Pollock in his commentary on the Indian Contract Act says in his notes on section 45 :—

It seems therefore to be the better opinion that the representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrues due to the partnership in the lifetime of the deceased. It has been so laid down by the High Courts of Allahabad, Bombay and Madras.

After examination of the decided cases he refers to, I agree with him in the above opinion. Upon this view the holding of letters of administration or a certificate of heirship by one of the plaintiffs is unnecessary. In *Vaidyanatha Ayyar v. Chinnasami Nair* (2) it was said that a suit by the surviving partner conjointly with the heir of the deceased would be maintainable, but in such case a certificate of heirship would be necessary, unless it appeared on the face of the document sued on that the debt was a coparcenary debt.

This last view, however, was not adopted in *Subramanian Chetti v. Rakku Servai* (3) and it was stated that the Court recognized that other proof of the debt being joint beyond what appears on the face of the document could be given.

In *Jagmohandas Killa Bhai v. Allumaria Duskal* (4) it was held that a plaintiff does not require a certificate where his claim is for family property by right of survivorship, and that where a plaintiff's family is admitted or proved to be a joint Hindu family, but there is no direct evidence as to the nature of the debt claimed by the plaintiff, the presumption is that it is a family debt.

In the present case, whether the plaintiff's claim as surviving partners or by right of survivorship under the Hindu Law by which they are governed, it appears to me that the objections that Pallaneappa's estate

(1) (1890) I.L.R. 18 Cal., 86.

(2) (1893) I.L.R. 17 Mad, 108.

(3) (1897) I.L.R. 20 Mad., 232.

(4) (1894) I.L.R. 19 Bom., 338.

was not represented by any plaintiff, and that none of them held letters of administration or a certificate under the Succession Certificate Act were not good objections to the suit.

I set aside the order of the Small Cause Court and direct that the suit be heard on the merits.

The respondent must pay the plaintiff's costs in this Court—2 gold mohurs are allowed as Advocate's fee.

*Before Sir Charles Fox, Chief Judge.*

M.N.N. RAMAN CHETTY v. ABDUL KADER AND OTHERS.

*McDonnell*—for applicant (plaintiff).

*N.N. Burjorjee*—for respondents (defendants).

*Insolvent debtor—Composition with creditors—Unscheduled debt—Liability on negotiated promissory note—Fraud—Bar to suit—Indian Insolvency Act, 1848.*

A was adjudicated an insolvent, and entered into a composition deed with certain of his creditors which was to operate, on compliance with its terms, as effectually as an order of final discharge under the Indian Insolvency Act, in respect of the debts due to the assenting creditors. The amount due to each was shown in a schedule to the deed.

B, one of these creditors, subsequently sued A for a sum due on two promissory notes made in favour of A by C, and negotiated by A with B. The amount due on these notes had not been included as due to B in the schedule to the composition deed or brought to the notice of the other creditors.

*Held*,—the B was therefore debarred from suing A for the amount.

*Brillen v. Hughes*, (1829) 5 Bingham, 460, followed.

*Payler v. Homersham*, (1815) 5 Maule & Selwyn, 423 referred to.

The plaintiff sued the partners of the firm of Sharaff Ally Esabhoy, and the partners of the firm of Abdul Kader Mahomed Ally & Co., on two promissory notes made by the former firm in favour of the latter firm, and negotiated by it with the plaintiff. Both notes were payable at certain dates after execution, and both fell due in January 1905. In December 1904, the partners in the firm of Abdul Kader Mahomed Ally & Co. were adjudicated insolvent, but on the 11th April 1905 they entered into a composition deed with certain of their creditors, of whom the plaintiff was one, whereby these creditors accepted a composition of six annas in the rupee in discharge of the debts due to them, on the amount being guaranteed by a third party. Thereafter the insolvency adjudication was annulled by consent. By the composition deed the composition of six annas in the rupee was accepted by the creditors in full discharge of their respective debts, and it was provided that upon payment of the first instalment of it, and on delivery to the creditors of hundis securing the second and third instalments, the deed should operate as fully and effectually as an order of final discharge under the Act for the Relief of Insolvent Debtors in India, and might be pleaded in bar to any claim in respect of any such debts. In the schedule to the deed the names of the assenting creditors were set out, and the amount due to each was put against his name, and his signature affixed opposite. The amount put down as due to the plaintiff was Rs. 1,475-7-0 and the amount due to him under the composition was Rs. 553-2-0. The amount of Rs. 1,475-7-0 did not include the amount due on the promissory notes sued upon in the suit

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PERIANAN  
CHETTY  
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ARMUGA  
PATHER.

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M.N.N.  
RAMAN  
CHETTY.  
v.  
ABDUL  
KADER.

out of which this revisional application arises. The learned Judge acting on the authority of *Britten v. Hughes* (1) dismissed the suit

It has been contended the he was wrong in so doing. It was argued that the decision in *Birtlen v. Hughes* (1) proceeded on the ground of fraud, and that in the present case there was not the vestige or possibility of fraud because at the time the plaintiff signed the composition deed he naturally looked to the makers of the note, *i.e.*, the partners of the firm of Sharaff Ally Esabhoy, to pay the amount due on the note now sued on. *Paylu Homersham* (2) was relied on as showing that a creditor who enters into a composition deed with other creditors may reserve a particular debt from the composition, and may sue upon it subsequently. That case was considered in *Britten v. Hughes* (1) and one at least of the learned Judges considers that the decision of the majority overruled it.

The facts in *Britten v. Hughes* (1) were almost identical with the facts in the present case. The plaintiffs held two bills on which the defendant was liable. They put their names down in the composition deed as creditors in respect of one bill only. The reason why the amount of the other bill was not entered was because the defendant had said he expected that the acceptor would pay it, and the plaintiffs, looking to the acceptor, abstained from taking a composition for the amount due on this bill.

Best, C.J., directed a non-suit, and the case came before a bench of four Judges upon a rule *nisi* to set aside the non-suit. The rule was discharged. The judgments of the learned Judges contain many interesting observations, amongst which the following may be quoted :—

"The principle is clear that upon a composition deed all the parties are supposed to stand in the same situation, and if there is any one of them who refuses to do so, he must announce it at the time. . . . I put this case on the ground; I do not mean moral fraud, but fraud in law; and a practice of this sort has a great tendency to encourage moral fraud. . . . If such a reservation could be made with the consent of the debtor, it would be a fraud on the other creditors, as calculated to mislead their judgment; if without the consent of the debtor, it would be a fraud against him also. . . . But the main ground on which we decide is that if reservations like this be allowed, no man again will agree to a deed of composition. Such transactions are necessarily *uberrimæ fidei*, and no engagement can stand which has been withheld from the knowledge of the whole body of the creditors, and which it would have been material for them to know. . . . The object of this deed is express, that the defendant should go clear of his debts; and though perhaps there may have been an understanding with the plaintiff, to support it would lead to infinite fraud. . . . We should be very strict in the construction of deeds of this kind, which are executed on the supposition of the creditors all standing on the same footing. The creditors here all meant to release the defendant. . . . The defendant was to be made a free man, and the deed given in evidence is conclusive against the plaintiffs.

(1) (1829) 5 Bingham, 460. | (2) (1815) 4 Maule & Selwyn 423.



The above observations apply to the present case. No decision questioning the correctness of them has been brought to my notice, and I hold that the law is the same now as it was stated to be in the year 1829.

The present plaintiff did not assert that he made the reservation of the debt now sued on known to the other creditors, consequently there was nothing for the Judge to enter into in this respect.

The application is dismissed with costs—two gold mohurs allowed as advocate's fee.

Before Mr. Justice Hartnoll.

KING-EMPEROR v. RAMARA.

*Escape from custody—Lawful detention—Indian Penal Code, s. 225B—Issue of process for recovery of revenues—Arrears—Defaulter—Arrest—Burma Land and Revenue Act, 1876, ss. 44, 45.*

A person cannot be convicted, under section 225B of the Indian Penal Code, of escape or attempt to escape, unless the custody in which he was detained was lawful.

No process for the recovery of revenue can be issued until the amount due has become an arrear, under section 44 of the Burma Land and Revenue Act, by the lapse of ten days from the service of publication of a written notice of demand.

The following reference was made by the Sessions Judge, Delta Division, under section 438 of the Code of Criminal Procedure :—

In Criminal Regular Trial No. 147 of 1906 of the 2nd class Township Magistrate, Maubin, Ramara was convicted on the 11th December under section 225B, Indian Penal Code, of escape from lawful custody, and was sentenced to suffer one month's rigorous imprisonment. Ramara appealed to the Special Power Magistrate, Maubin, by whom the conviction was confirmed, but the sentence reduced to the term of imprisonment already undergone, *viz.*, 11 days. The case was called for by me on perusal of the monthly statements.

The facts of the case are simple. It appears that on the 10th December the Township Officer, Maubin (who is also the Magistrate who tried the case), was checking capitation-tax. He came across Ramara on a cargo boat and found that Ramara had no receipt for capitation-tax. He accordingly at once demanded Rs. 2-8 for Ramara. Ramara did not pay, and the Township Officer immediately issued a warrant, Exhibit A, for Ramara's arrest. The warrant is irregular as it is addressed to the Bailiff but was delivered to, and executed by, the *thugyi* Shwe Ke, who arrested Ramara and six other boatmen, and kept them for the night of the 10th December in their cargo boat under watch. At about midnight Ramara and the other boatmen made sail and tried to clear off, but were recaptured. Ramara was tried and convicted the next day by the Township Magistrate.

I am of opinion that the arrest was illegal, and therefore that accused was not lawfully detained in custody and committed no offence in escaping. It may, I think, be assumed that the sum demanded from him was due under section 43 of the Lower Burma Land and Revenue Act. But he was not a defaulter as defined within section 44 of the Act.

1907.

M. N. N.  
RAMAN  
CHETTY  
v.  
ABDUL  
KADER.

Criminal  
Revision  
No. 32B of  
1907.

March 16th  
1907.

1907.  
KING-  
EMPEROR  
v.  
RAMARA.

He had not been served with any written notice of demand, nor does it appear that notice of demand from him had been published in any other way. I am of opinion therefore that he was not a defaulter, and that the Township Officer had no power to issue process for his arrest.

The sentence has been undergone, but the point raised is one of some importance. I therefore submit the proceedings to the Chief Court with the recommendation that the conviction be set aside.

*The decision of this Court was as follows :—*

Amongst other matters section 225B of the Indian Penal Code renders punishable an escape or attempt to escape from custody in which a person is lawfully detained. It is therefore necessary for the prosecution to prove in a prosecution for an escape under the section that the accused person was lawfully detained.

In the present instance it appears that the Township Officer was checking the payment of the capitation-tax on the 10th December last, and that he found one Ramara without a tax receipt, whereupon he immediately issued a warrant for his arrest. The warrant was executed, and on the same night Ramara escaped and was recaptured. He was prosecuted and convicted under section 225B of the Indian Penal Code. It would appear that the conviction was bad, as Ramara was not lawfully detained in custody. Before process can issue for the recovery of a tax it must have become an arrear. Section 44 of the Burma Land and Revenue Act (II of 1876) describes the procedure to be followed in order to the creation of an arrear. The tax must have fallen due and a written notice of demand must have been served on any one of the persons liable for it, or published in such manner as the Lieutenant-Governor may from time to time by rule direct, and ten days must have elapsed from the service or publication of such notice without such sum having been paid, before the tax can be deemed to be an arrear. In the present case this section was entirely ignored. There was therefore no arrear and no process could legally issue. Ramara's detention was consequently unlawful and section 225B of the Indian Penal Code would not apply to him.

I accordingly set aside the conviction.

As Ramara is not now in custody no further orders are necessary.

#### Full Bench—(Criminal Revision).

*Before Sir Charles Fox, Chief Judge, Mr. Justice Irwin, C.S.I.,  
and Mr. Justice Hartnoll.*

KING-EMPEROR v. MI THIN.

Criminal  
Revision  
No. 1380 of  
1906,  
March 18th,  
1907.

*Owner of common gaming-house taking part in gambling—Double conviction—  
Sentence—Separable offences—Burma Gambling Act, ss. 11, 12—Indian Penal,  
Code, s. 71—Criminal Procedure Code, ss. 35, 235.*

The taking part in gambling by the house-owner or occupant himself may be and often so, a part of the method of conducting or of assisting in conducting the business of a common gaming-house, and may also be a part of the way in which a house is used as a common gaming-house for the profit or gain of the owner or occupier.

A house-owner, therefore, who used her house as a common gaming-house, and at the same time took part herself in the unlawful card-playing therein, was held

to be only liable, by virtue of section 71 of the Indian Penal Code, to one sentence, viz., under section 12 of the Burma Gambling Act, although she was liable to convictions under both section 11 and section 12.

*Crown v. Shwe Pe and others*, 1 L.B.R., 178. overruled.

The following reference was made to the Chief Judge by Mr. Justice Hartnoll, under Rule 2 (3) of the Chief Court Notification No. 2, dated the 22nd January 1903 :—

Mi Thin was convicted of, and fined for, two offences, one under section 11 and the other under section 12 of the Burma Gambling Act. The District Magistrate of Pegu has reported the case under section 438 (1) of the Criminal Procedure Code, referring to the case of *Crown v. Shwe Pe (1)* and recommending that the conviction and sentence under section 11 be set aside.

The evidence on which Mi Thin was convicted shows that she allowed her house to be used for card-playing, taking commission from the players, and that at the same time as she took commission she was playing herself, and so disclose offences against her punishable under both sections 12 and 11 of the Burma Gambling Act.

Under section 235 (1) of the Code of Criminal Procedure it seems to be a question as to whether Mi Thin could not have been tried and convicted of both offences, and in this respect I am inclined to differ from the decision of Birks, J., expressed in the case noted above.

The question remains whether both sentences are legal. In considering this point regard must be paid to the provisions of section 71 of the Indian Penal Code, section 35 of the Criminal Procedure Code and section 26 of the General Clauses Act. It would seem to much depend on the circumstances of each case in my opinion. For instance, if the owner of the gaming-house took part in the game and his part was such that he was merely collecting his profits by the part he took, he would seem to be committing offences under section 12 (a) and section 11, but under the first paragraph of section 71 of the Indian Penal Code coupled with the explanation to section 35 of the Criminal Procedure Code, he could only be punished with the punishment of one such offence; whereas if he joined in the game with the others and won and lost according to the ordinary rules of the game with them, and in addition if he took a commission of so much for the cards for a fixed period from each person, he would also seem to be committing offences under section 12 (a) and section 11, but, as the playing as distinct from the taking of commission would not be an offence, or part of an offence, under section 12, and would be separate and distinct from an offence under that section, it seems to be a question as to whether section 71 of the Indian Penal Code would apply and whether separate punishments could not be awarded under section 11 and section 12.

Applying the above remarks to the present case I would note that it is not clear what part Mi Thin was taking in the game. The rules of the game were not stated nor was the part she took gone into. It is a point for consideration, therefore, whether the view most

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favourable to her should not be taken, that is, that her part would entitle her to the benefit of the provisions of section 71 of the Indian Penal Code and the explanation to section 35 of the Criminal Procedure Code.

As at present advised I should be inclined not to interfere with the conviction, but to set aside the sentence of fine passed on her under section 11 and to direct that, if paid in whole or in part, it be refunded to her.

As my views as at present advised differ from those of Birks, J., in the case of the *Crown v. Shwe Pe* (1), I submit the case to the Chief Judge, as he may perhaps wish to act under Rule 2 (3) of the Chief Court Notification No. 2, dated the 22nd January 1903.

*The opinion of this Bench was as follows :—*

*Irwin, J.*—Mi Thin was convicted of using her house as a common gaming-house, under section 12, and of playing cards for money in the same house, under section 11, of the Burma Gambling Act. For each offence she was fined Rs. 50.

I am strongly of opinion that the Legislature did not intend that one person should be punished at the same time under both sections in respect of the same house, and that the double sentence is not within the spirit of the Act; but this opinion is based mainly on general principles, whereas the decision of the question whether the double sentence is legal must depend on a reasonable construction of the words of the law, not on speculations as to the intentions of the Legislature.

I have no doubt that the double conviction is legal, under section 235 of the Code of Criminal Procedure. The double sentence is not prohibited by anything in the Act itself, and must be held to be legal unless it is within the terms of the first class of section 71 of the Penal Code.

The question may be put thus—"Is playing for money in a common gaming-house part of any offence under section 12? If it is part, what is the other part which would complete the offence under section 12?" I can find no answer to this question.

Being present in a common gaming-house for the purpose of gaming is another offence under section 11. Mr. Justice Birks seems to have held that this is part of the offence of assisting in conducting the business of a common gaming-house, and I have heretofore expressed a similar opinion; but no further consideration I think that this construction strains the natural meaning of the words, and moreover if it could be held that the offences of assisting in conducting the business of a common gaming-house and being present for the purpose of gaming are within the terms of section 71 of the Penal Code it would not follow that the offences of keeping common gaming-house and playing cards for money therein are also within the terms of that section.

I am therefore constrained, very unwillingly, and notwithstanding the very liberal construction put on section 71 by the illustration to section 35 of the Code of Criminal Procedure, to hold that the double

sentence for using the house as a common gaming-house and playing cards for money therein is not illegal. I do not think there is any occasion to look at the evidence. The Magistrate's finding is clear enough, namely, that Mi Thin, in addition to using her house as a common gaming-house, did an act which is punishable under section 11 and not under section 12. She could have appealed, and has not done so. Apart from the legal point on which the case was reported there are no grounds for interference with the sentence. Therefore I would not interfere.

I am unable to follow the distinction made by my learned colleague. In my opinion merely collecting commission is not taking part in the game at all. As for the facts, the Magistrate's finding is that Mi Thin played cards for money, which is quite a different thing from collecting commission from the players.

As Mr. Justice Hartnoll and I are not agreed on this point, the case will be laid before the Chief Judge, under sections 439 and 429, Code of Criminal Procedure.

*Hartnoll, J.*—I concur in considering that the double conviction is legal.

As regards the double sentence it seems to me to depend on the exact circumstances of the case. If Mi Thin's position as one of the players was such that her part was merely the collecting of her commission or profit, she would be playing and taking part in the game, but her part would be such that it would constitute a part of the offence punishable under section 12 (a), and so under section 71 of the Indian Penal Code and section 35 of the Criminal Procedure Code a double sentence would be illegal; on the other hand, if the part she took in the playing was such that it was quite distinct from any part of the offence punishable under section 12 (a), the double sentence would seem to me to be legal. For instance, it would be legal if she took commission and besides, if she joined in the game and won or lost with the others according to the rules. Her second action would have nothing to do with an offence punishable under section 12 (a). In the present instance it seems to me to be not clear whether the part Mi Thin took in the play was distinct from the taking of commission, and since this is so her acts might be protected by section 71, Indian Penal Code, and section 35, Criminal Procedure Code. The rules of the game were not stated nor gone into, and the Magistrate who decided the case had not in his mind, as far as the record shows, the distinction drawn by me. It seems to me quite possible that the rules of the game might have been such that Mi Thin was actually only one of the players for the purpose of obtaining commission and that she may not have taken a further part than this. The matter seems to me clouded in doubt as it was not gone into. I would therefore give Mi Thin the benefit of all doubts, as the points at issue are somewhat intricate legal ones, and would set aside the sentence of fine passed on her under section 11 of the Gambling Act and direct that, if paid in whole or in part, it be refunded to her.

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*Final Order.*

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*Fox, C.J.*—The point on which the two learned Judges who have referred this case to me have differed, is whether the double sentence was legal.

The Magistrate found that the accused had used her house as a common gaming-house, and also that she had herself played cards for money in the house when it was so used.

The first finding justified a conviction under section 12 of the Burma Gambling Act, and the second finding justified a conviction under section 11 of the Act, but in my opinion not more than one sentence, *viz.*, a sentence for the offence under section 12 of the Act, was legal.

An offence under section 12 may be committed by doing the various things set out in the clauses of the section. As regards an offence under this section the Magistrate found that the accused had done one only of the things mentioned, but the taking part in the game by the house-owner or occupant himself may be, and often is, a part of the method of conducting or of assisting in conducting the business of a common gaming-house, and so also it may be a part of the way in which a house is used as a common gaming-house for the profit or gain of the owner or occupier.

In my opinion section 71 of the Indian Penal Code applies to such a case, and the accused was not liable to be sentenced for an offence under section 11 of the Act in addition to being sentenced under section 12.

I set aside the sentence under section 11, and direct that the fine, if paid, be refunded.

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Appeal  
No. 94 of  
1906.

April 26th,  
1907.

*Before Mr. Justice Hartnoll.*

MAUNG SHAN v. NYO WIN.

*N. M. Cwasjee*—for appellant (plaintiff).

*Chari*—for respondent (defendant).

*Tender of debt before action—Refusal of tender—Ineffectual tender—Payment into Court—Duty of debtor—Interest.*

A owed B money by virtue of a contract which involved the payment of interest on the amount of the debt. A tendered the amount to B, who wrongly refused it. B subsequently sued A, who failed to pay the amount of the debt into Court.

*Held.*—that B was not entitled to interest during the interval between the date of tender and the date of institution of the suit; but that it was A's duty, on becoming aware of the institution of the suit; to pay into Court the amount due at the date of tender, and that B was entitled to interest on that amount, at a suitable rate, from the date of institution of the suit till the date of realization.

*Haji Abdul Rahman v. Haji Noor Mahomed*, (1891) I.L.R. 16 Bom., 141, dissented from.

\* \* \* \* \*

As regards the second ground I find myself at variance with the decision in the case of *Haji Abdul Rahman v. Haji Noor Mahomed* (1), in which it was held that a plea of tender before action must be accompanied by a payment into Court after action, or otherwise the

(1) (1891) I.L.R. Bom., 141.

tender is ineffectual. It seems to me that it would not be just to mulct a person in interest after he has offered the amount due on a certain debt, when the amount has been wrongfully refused by the creditor, for the whole period of time during which the creditor is kept out of interest owing to his own default and wrongful action. At the same time, when the creditor brings his suit, it seems to me that it is the duty of the debtor on receiving intimation of the suit to at once pay into Court the amount due up to the time he made his tender. The bringing of the suit is a further demand for payment on the part of the creditor, and the debtor should comply with the demand by offering the amount due. The result is as regards the present suit that I am of opinion that the defendant should not be liable for interest according to the original contract from the date he made tender of payment until the date of the suit being instituted; but that from the latter date, as he did not pay the sum due into Court, he should be liable to suitable interest, though not necessarily interest at the rate specified in the original contract, on the sum due when the tender was made until date of realization or payment into Court.

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Before Mr. Justice Hartnoll.

SU WE v. KING-EMPEROR.

Nicol—for applicant.

*Claim of third person to attached property of absconder—Ownership of attached property—Duty of Magistrate—Civil suit—Criminal Procedure Code, s. 88.*

There is no provision of law requiring a Magistrate who has attached property under section 88 of the Code of Criminal Procedure to investigate the claims of third persons to the ownership of such property. If a Magistrate passes an erroneous order in respect of such property, the only remedy is by way of civil suit.

*Queen-Empress v. Sheodihal Rai* (1884) I.L.R. 6 All., 487; *Queen-Empress v. Kandappa Goundan*, (1896) I.L.R. 20 Mad., 88; followed.

The District Magistrate attached Maung Kyaw Ke's property under section 88 of the Criminal Procedure Code, and there is no provision of law requiring a Magistrate who has attached property under this section to investigate the claims of third persons to the ownership of such property. This was ruled in the case of *Queen-Empress v. Sheodihal Rai* (1) and I see no reason to dissent from that ruling. Moreover, in the case of *Queen-Empress v. Kandappa Goundan* (2), it was held that where a claim is made to property attached under section 88 of the Code the Magistrate should stay the sale to give the claimant time to establish his right, and that if the Magistrate errs the remedy of the aggrieved party is by civil suit and not by criminal revision petition. In the present case the elephant has been sold, and that is a further strong ground for not interfering. Petitioner's remedy seems to be by way of civil suit and I dismiss the application.

(1) (1884) I.L.R. 6 All., 487. | (2) (1896) I.L.R. 20 Mad., 88.

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*Criminal  
Revision  
No. 28 B of  
1907.  
May 15th,  
1907.*



## Civil Reference.

Before Mr. Justice Hartnoll and Mr. Justice Moore.

MA LEIK AND OTHERS v. MAUNG NWA AND OTHERS.

*Maung Kin*—for appellants (defendants).Civil  
Reference  
No. 3 of  
1907.June 12th,  
1907.*Buddhist Law : Inheritance*—Share of child of deceased first wife in property inherited by father after first and before second marriage—Inherited property.

A. a Burma Buddhist died leaving (1) a son by his deceased first wife, (2) his second wife, and (3) children by his second wife. He had inherited property moveable and immovable, after the death of his first wife and before his marriage with his second wife.

*Held*,—that the son by the first wife was entitled to a half share of the property so inherited.

*Ma Ba We v. Sa U*, 2 L.B.R. 174; *Chit Saya v. Mein Gale*, 2 L.C. (Chan Toon), 97; *Po Sem v. Ma Pwa*, 1 L.C. (Chan Toon), 292; *Shwe Ngôn v. Ma Min Dwe*, S.J., L.B., 110; *Mi Ka v. Maung Thet*, S.J., L.B., 6; *Myat Kaung v. Ma Gyaing*, P.J., L.B., 534; *Tun Lu v. Po Yauk*, S.J., L.B., 255; referred to.

The following reference was made to a Bench by Mr. Justice Hartnoll:—

Maung Nwa by his guardian Maung Htaw brings a suit for partition of his inheritance against Ma Leik, his step-mother, and her minor children who are represented by her, under the following circumstances.

He states that his own mother was Ma Sein Bwin, who died in 1259 B.E., and that his father Maung Ge married Ma Leik in 1261 B.E. He then gives a list of the property which he asserts is in possession of Ma Leik and himself. He also says that in 1260 B.E., after his mother's death and before his father married Ma Leik, there was a partition of the estate of his father's parents, at which his father received as his share 18'30 acres of land and for which he had to pay Rs. 200 to the other co-heirs, this sum being part of the joint property of his father and mother.

He asked for a three-quarter share of the property that he alleged Maung Ge brought to his marriage with Ma Sein Bwin, and an eighth share in the property acquired during such marriage. He also asked for a three-quarter share in the rents of the paddy land inherited by Maung Ge, and mentioned that he had paid a debt of Rs. 312 due from his father to Maung Hman. He therefore asked that an enquiry be made and account taken of what share he was entitled to as heir and for payment to him of such share, and he further asked for a decree that the estate of Maung Ge and Ma Sein Bwin be administered by the Court.

Ma Leik answered by admitting some of the facts alleged by Maung Nwa, but denying others. She also alleged that the estate was different in some respects to what Maung Nwa stated that it was. She further contested the fact that Maung Nwa had paid a debt of Rs. 312 that was owing by Maung Ge.

On the case being tried by the Subdivisional Judge, he found that the property brought by Maung Ge to the marriage with Ma Leik consisted of the inherited land 2½ ticals of gold, one large silver bowl, four small silver cups, three *putzoos*, and one ruby ring, and he gave

Maung Nwa a five-eighth share in this property. He also gave Maung Nwa a five-eighth share in the rents of the land for 1265 B.E. and 1266 B.E. less revenue paid for those years, which was five-eighths of Rs. 449-2. As regards the house and ground, which was found to be the property that was acquired during Maung Ge's and Ma Sein Bwin's marriage, he gave Maung Nwa a quarter share.

He further found that it was not proved that Maung Nwa had paid a debt of Rs. 312 due by Maung Ge to the latter's creditor.

Against this decision an appeal was laid by Ma Leik. The Divisional Judge found that Maung Nwa had paid a debt of Rs. 312 due by Maung Ge to another, and directed that he should recover it out of the estate. He further found that the *attetpa* property of Maung Ge consisted of—

- (1) the share of Maung Ge in two durian gardens ;
- (2) the paddy land measuring 18'30 acres ;
- (3) one silver bowl ;
- (4) four small silver bowls ;
- (5) three *putzoes* ;
- (6)  $2\frac{1}{2}$  ticals of gold ;
- (7) one ruby ring ;
- (8) the rent of paddy land :

which seems to have been Rs. 270 in 1265 and Rs. 300 in 1266, and he gave Maung Nwa a three-quarter share in such property. He gave him in the property jointly acquired during the marriage of Maung Ge and Ma Sein Bwin, which he found to be a house and granary, and eight share.

Against this decision Ma Leik lays a further appeal on the following grounds—

- (1) that the lower Courts erred in treating the paddy land as *payin* instead of *thinlhi* or separate property of Maung Ge ;
- (2) that they erred in treating the silver and gold articles, the *putzoes*, and the ruby ring as *attetpa* property of Maung Ge ;
- (3) that they failed to notice the differences between *payin*, *attetpa* and inherited property, and should have considered the Buddhist Law as to the distribution of shares to which the heirs are respectively entitled with due regard to such difference ;
- (4) that the Divisional Court should have held that in the properties which were admittedly inherited by Maung Ge after the death of Ma Sein Bwin and before his marriage with Ma Leik, Maung Nwa was only entitled to a one-sixth share ;
- (5) that the Divisional Court was wrong in holding that a sum of Rs. 312 was due from Maung Ge's estate.

I will deal with the last ground first, and with respect to it I see no reason to differ from the decision arrived at by the learned Divisional Judge. It seems to me proved that, when Maung Ge died, a sum of Rs. 312 was owing for the house and ground where Ma Leik was

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living when the suit was brought. Maung Cheik deposes to making them over to Maung Hman in satisfaction of a debt. From the evidence of Maung Lôn and Maung Dwe it seems clear that Maung Htaw paid the sum to Maung Hman on behalf of Maung Nwa. Ma Leik cannot prove that the house was ever paid for, though she says that Maung Ge told her that it was. Since it appears that this debt was owing by Maung Ge, and that Maung Nwa through Maung Htaw has paid it, I am of opinion that Maung Nwa is now entitled to recover it from the estate. I must therefore hold that the fifth ground of the appeal must fail.

The other four grounds concern the Buddhist law of inheritance. In appeal it was argued on behalf of the appellants that as regards the *attetpa* property, if it be held to be the property acquired during the marriage of Maung Ge and Ma Sein Bwin and the property inherited after Ma Sein Bwin's death, Maung Nwa should only get a half share, the widow and children of the second marriage being entitled to a quarter share each, and the cases of *Ma Ba We v. Sa U* (1) and *Chit Saya v. Mein Gale* (2) were referred to in this connection; but it was further urged that the property inherited after Ma Sein Bwin's death stood on a different footing to the rest of the property brought by Maung Ge to his second marriage and that Maung Nwa should only get a one-sixth share in it, the remainder going to Ma Leik and her children. In support of this contention were quoted the cases of *Po Sein v. Ma Pwa* (3) and *Shwe Ngôn v. Ma Min Dwe* (4). The text of *Dayajja* in section 229 of the Digest on Buddhist Law was also referred to. With regard to the property other than that inherited by Maung Ge, I see no reason to differ from the Divisional Judge. The weight of authority as shown by the texts in section 229 of the Digest is in favour of the issue of the first marriage obtaining a three-quarter share where there have been two marriages. The cases of *Chit Saya v. Mein Gale* (2) and *Ba We v. Sa U* (1) deal with families where there have been three marriages. In the case of *Mi Ka v. Maung Thei* (5) it was held that a second wife's share in the property of the first marriage was one-quarter as compared with three-quarters falling to the share of the first wife. The same division between the children of the first and second marriages was given in the cases of *Myat Kaung v. Ma Gyaing* (6). I am not disposed to hold that, because the widow and children of the second marriage are alive, the division should be different, unless good authority is shown me for so holding, and such authority has not been shown me.

But with regard to the inherited property, which consists of the paddy land and the  $2\frac{1}{2}$  ticals of gold, the matter seems to stand on a different footing. The reason for giving the wife and issue of a certain marriage a larger share in the property acquired during such marriage than other wives and children of other marriages, and which is the fact that the wife of such marriage helped to acquire and preserve it,

(1) 2 L.B.R., 174.

(2) 2 L.C. (Chan Toon), 97.

(3) 1 L.C. (Chan Toon), 292.

(4) S.J., L.B., 110.

(5) S.J., L.B., 6.

(6) P.J., L.B., 534.

does not exist where property devolves by right of inheritance. It is not jointly acquired by joint skill and labour. The subject is dealt with in the case of *Shwe Ngón v. Ma Min Dwe* (4) and was again considered in the case of *Tun Lu v. Po Yauk* (7). It was not considered in the cases of *Chit Saya v. Mein Gale* (2) and *Ba We v. Sa U* (1).

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Reference to inherited property will be found at the following pages of the Digest, 237, 240, 288, 301, 307, 321 and 325. Though I have been able to find little about the subject in the *Dhammathals*, it seems to me that the little I have found points to the fact that inherited property does not follow the same rules as property jointly acquired. Chapter 12, section 3, of the *Manugyè* lays down the two different kinds of property. Section 38 of Chapter 10 of the *Manugyè* favours an equal division of inherited property between different wives, for it says: "If the husband shall have inherited his parent's property after the marriage of these wives, let them divide it and share according to their class."

In the present instance the wives are of the same class. Section 8 of the same chapter gives the step-father and step-son equal shares in property inherited by the wife or mother from her parents during the time of her coverture with her second husband. The *Dayajja* at page 288 of the Digest says: "The father's separate property acquired before he contracted his second marriage shall be partitioned between the children and their step-mother in the proportion of one to five respectively"; but no reason is given for such a distribution. The *Dhamma* at page 301 of the Digest, and the *Cittara* at page 307, give different rules with regard to the division of hereditary estate. The *Manugyè* at page 321 of the Digest deals with hereditary property and favours the wife and children during whose time it devolved. It seems to me that no fixed rule can be derived from the *Dhammathals*.

In the present case the property was inherited between the two marriages, and it would seem equitable to allow an equal division; but the point is one not free from doubt and difficulty, and I think that it would be well to have authoritative decision on the point.

I therefore refer to a bench, full or otherwise as the learned Chief Judge may direct, the following question:—

"Where property, moveable and immoveable, is inherited by a man after the death of his first wife, by whom he has a son, and before his marriage with his second wife, by whom he has children, to what share of such property is his son by his first marriage entitled after his death?"

*The opinion of the Bench was as follows:—*

*Moore, J.*—The question referred for our decision is: "Where property, moveable or immoveable, is inherited by a man after the death of his first wife, by whom he has a son, and before his marriage with his second wife, by whom he has children, to what share of such property is his son by his first marriage entitled after his death?"

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The rulings in the different *Dhammathats* as to partition among children of a former marriage, their step-mother, and children of the second marriage are collected together in section 229, Chapter X, of Volume I of the Digest of Burmese Buddhist Law.

*Vilasa*.—The *Vilasa* lays down that of the property brought by the father to the second marriage, the children of the first marriage on his death shall get three shares and the step-mother or second wife one share.

The expression which is very freely translated as "property brought by the father to the second marriage" is in the Burmese text မိဘဝါဒ်ဥပစ္စေသ, which seems to me to clearly indicate that the property referred to is the joint property of the father and his first wife.

*Kungya*.—The *Kungya* gives a different rule of division. It allows of the property taken by the father to the second marriage five-eighths to the children of the first marriage, two-eighths to the second wife, and one-eighth to the children of the second marriage.

Here again the expression "property taken to the second marriage" is a very free translation of the Original, in which the words are simply ခေမ္မဥပစ္စေသ, "former property" or property of the former marriage.

*Yazathat*.—In the *Yazathat* the same expression is used as in the *Kungya* (ခေမ္မဥပစ္စေသ), but it is here translated "property belonging to the first marriage and taken to the second." The *Yazathat* gives a half to the children of the first marriage, a quarter to the second wife, and a quarter to her children.

*Dhammathat Kyaw*.—This gives the same shares as the *Vilasa*, viz., three-quarters to the children of the first marriage and one-quarter to their step-mother. The step-mother gets her quarter share, because she prevents the property from being squandered. The children of the former marriage get three-quarters "because it was their parents' property even before they were born."

*Vannana*.—The rule here is the same as in the *Vilasa*. The property is tersely described as ဘဝဗျာဓိ, "property coming with the father," i.e., to the second marriage.

*Manuyin*.—This *Dhammathat* also follows the *Vilasa* in awarding three-quarters to the children of the first marriage and one-quarter to the widow, their step-mother. The property is here described as ခေမ္မဥပစ္စေသ, which would appear to mean simply property taken to the second marriage with the children of the first marriage. The *Manuyin* goes on to debar the children of the second marriage from any share in the property of the first marriage.

The *Rasi* gives the same shares as the *Vilasa* and speaks of the property as ခေမ္မဥပစ္စေသ, which is translated "property brought by him the husband."

The *Vinicchaya* is the same as the *Kungya*, awarding the children of the first marriage five-eighths of the property "originally brought by their father," presumably to the second marriage.

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The *Manuvannana* awards the children of the first marriage three-quarters of the property of the father and mother and one-quarter to the step-mother.

The *Vicchadani* rules that if when the father dies there is any of the "former property," အထွေထွေ အထွေထွေ remaining, the former children, အထွေထွေ shall receive three shares and their step-mother one share. The expressions အထွေထွေ and အထွေထွေ must, I think, be taken to mean "property of the former marriage" and "children of the former marriage" respectively.

The *Rajabala* lays down that if the house was the property of the former marriage, the children of that marriage may acquire it on paying a quarter of its value.

The *Dayajja* gives the children of the first marriage three-quarters of the property of their parents, *i.e.*, of the joint property of the first marriage. Then follows a difficult and obscure passage which has been translated: "The father's separate property acquired before he contracted his second marriage shall be partitioned between the children and their step-mother in the proportion of one to five." I am not clear that this is a correct translation. It appears to me that the text may be also construed as referring only to the separate property of the father before his first marriage. The same *Dhammalhat* goes on to give a contradictory rule, assigning three-fifth shares to the children of the first marriage in the property taken to the second marriage.

The *Dhammasara* and *Kyetyo* give the same rule as the *Vilasa*.

There is thus a fairly general consensus of authority for the proposition that of the property taken by the father to the second marriage the children of the first marriage shall receive three-quarters and their step-mother one-quarter. But I think it is clear from the above quotations that the property referred to is the property of the first marriage and that the children of the first marriage are awarded a larger share in this property, because it was "their parents' property at the commencement of their union." If this view be accepted the reason for fixing the share at three-quarters is apparent. The property being considered as belonging equally to the father and his first wife, the children of the first marriage take the whole of their mother's share, namely, a half, being her sole representatives, and half of their father's share, in which they are considered as having equal rights with the offspring of the second union as represented by their mother.

It is, however, clear that the children of the first marriage cannot have any superior claim through their mother to property inherited by their father after her death.

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It has been suggested that the fact that this property was inherited should affect the method of partition in this case. If it had been inherited by the father during the continuance of the first marriage, I think that this might be the case. There is the authority for holding that the husband has a two-thirds and the wife only a one-third interest in property inherited by the husband during marriage, and upon that basis the children of the first marriage would seem to be entitled to a two-thirds instead of a three-quarter share in property inherited by their father during the first marriage. But as in the present case the property was inherited by the father after his first wife's death I do not think that there is any ground for treating it differently because it was inherited.

The *Dhammathats*, in the rules above quoted, agree in this respect that the division, whether between children of the two marriages, or between children of the first marriage and their step-mother, is always *per stirpes*, not *per capita*.

Following the principle which seems to me to underlie the rules for division of property acquired during the first marriage, *viz.*, that the children of that marriage take the whole of their mother's and one-half of their father's share, I think that the children of the first marriage are entitled to a half of any property inherited or otherwise acquired by their father between the death of his first wife and his second marriage.

I would therefore answer the reference as follows :—

"Under the circumstances set out in the order of reference the son by the first marriage is entitled to a one-half share in the property inherited by his father after the death of the first wife but before his marriage with his second wife."

*Hartnoll J.*—I concur in the answer to the reference proposed by my learned colleague.

At the arguing of the reference practically no more light was thrown on the rules governing the devolution of inherited property than appears in the order of reference.

The division should certainly be *per stirpes* and not *per capita*, and in that the property was inherited between the two marriages there seems to be no reasons why one family should be favoured before another.

Before Sir Charles Fox, Chief Judge and Mr. Justice Hartnoll.

(1) KHA HLAU, (2) POO SA v. KING-EMPEROR.

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Admission or conduct of two or more accused persons, Necessity for accurate report of—Information leading to discovery of fact—Necessity for accurate report of confession—Statement to police—Admissibility in evidence—Police custody—Indian Evidence Act, s. 27.

Where admission or incriminating actions by more than one accused person are deposed to, it is of the first importance that the witness should be made to describe as nearly as possible the exact words or conduct of each.

The greatest possible precision should also be insisted on in a statement concerning information given by an accused person which is alleged to have led to the discovery of a certain fact, and which is therefore admissible in evidence under section 27 of the Indian Evidence Act.



The discovery of a fact in consequence of information given by an accused person to the police does not render a subsequent confession to a police officer admissible in evidence, nor does section 27 of the Indian Evidence Act apply to information given to the police by an accused person who was not in custody at the time it was given.

*Queen-Empress v. Babu Lal*, (1884), I.L.R., 6 All., 509, followed.

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The appellants have been convicted of having murdered Sipat on the 23rd July 1906. The only actual eye witness of the crime was Pon Hun. Kwet Si, the headman, did not admit that he had seen the murder committed, but he spoke to having seen the three persons named by Pon Hun as having been present when the murder was committed by one of them acting together after the murder, burying some rice which the murdered man is said to have had, and into which the blood of the decapitated man fell.

The story of these two witnesses is that on the morning of the day on which the murder was committed they and Sipat left their villages for other villages each on his own business. Sipat must have finished his first. Pon Hun and Kwet Si were returning home in the afternoon, Pon Hun being ahead of Kwet Si. Pon Hun saw the two accused and Saing Wan, who has not been arrested, with Sipat. He saw the first accused deal a blow at Sipat with a *dah* on the neck, which cut off Sipat's head. Pon Hun ran away but came back with Kwet Si and looked at the three men again and saw that they were burying Sipat's rice in the pathway. He also saw them take Sipat's corpse to the south. The three men then saw him and Kwet Si, and threatened that if they gave information they would be killed and their houses would be burnt. Pon Hun went to his village and then to another village. He says he told a witness We Do, his son Krin Daw and Sipat's second wife Mi Praung Gaung of what had occurred.

He also says that when a police sergeant came three months afterwards he told him about it, and said that the two accused and Saing Wan had killed Sipat but the sergeant did nothing except take away the buried rice which he pointed out to him.

Kwet Si said that on his return journey Pon Hun turned round and told him that Sipat had been cut by Kha Hlaw, and advised him to run away for fear of being also cut. They both ran a little, and then returned and looked on at the three men burying the blood-covered rice. The men threatened them, and he and Pon Hun ran away in different directions. He did not go back to his village that night, and did not get back to it until next day at midday. He says he told his villagers to arrest the three men he had seen, but they did not obey him. On the following day a policeman came to the village and arrested him for dacoity, and he was under detention for three months. He also says he gave the sergeant who came inquiring about the occurrence the names of the two accused and Saing Wan. Both of the witnesses gave their ages as 59. Pon Hun is the brother-in-law of Kha Hlaw, and his daughter married the second accused's son. Kha Hlaw is Kwet Si's son-in-law, and Poo Sa is the latter's first cousin.

The absconder Saing Wan is alleged to have been the prime mover in the murder, and to have got Kha Hlaw to do the deed for Rs. 30.

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Saing Wan's motive is alleged to have been connected with his love for Sipat's principal wife who has disappeared.

The witness We Do says he heard Kha Hlaw ask Saing Wan for Rs. 20, the balance of what he had promised him for killing Sipat. We Do's story about his having overheard the conversation he speaks to is a very unlikely one. We Do says that Pon Hun had told him about the murder the day after it occurred.

Krin Daw said his father and Kwet Si told him on the day of the latter's arrest for dacoity that Sipat had been murdered by the two accused and Saing Wan.

Mi Praung Gaung says that on the day Sipat left with Kwet Si and Pon Hun for the Kala village, she saw the two accused and Saing Wan each armed with a *dah* going after them. Pon Hun returned in the evening, and told her husband had been cut by the two accused and Saing Wan. She says she told the villagers and Sipat's brother Pa Laung.

The latter's version of what she told him was that she thought that the two accused and Saing Wan had met him. This witness could not get any information about his missing brother although now not only Pon Hun and Kwet Si, but also Mi Praung Gaung, We Do, and Krin Daw say, the two first that they knew of their own knowledge, and the last three that they had been informed of who had murdered Sipat. The fact of the murder must have been concealed from the police who came to arrest Kwet Si two days after it occurred. In spite of the fact that some of the witnesses say they told head constable Pan Mra Aung, who came three months afterwards, the names of the persons concerned, it is not likely that they did so. There is no apparent reason why he should not have told the truth when he said that all that Pon Hun told him was that he had found some rice covered with blood on the road, and that he had seen the two accused and Saing Wan near the spot, but he did not know who had cut Sipat.

In view of their long concealment of their stories, I cannot regard the evidence of Pon Hun and Kwet Si as reliable and sufficient to justify a conviction. The fact of We Do, Krin Daw, and Mi Praung Gaung not having disclosed what they now say they had come to know to even Pa Laung, renders not only their own evidence but also that of Pon Hun and Kwet Si open to great doubt.

The next evidence arises out of what happened when two other police officers went to the village to investigate the crime. This is described by one of them as follows :—

"We arrived on the 14th December at the village, and on the 22nd the two accused showed where the bones were buried. I arrested them after they had shown me the place. They told me that they had killed Sipat, and that these places were where they had buried him. They said they first buried the body but that after the sergeant came they dug up the bones and buried them in different places."

It is to be observed in the first place that the police officer said nothing as to what happened between the 14th and 22nd of December or as to how it came about that the two accused showed the officers,

where the bones were. Presumably he was not asked any questions as to these matters.

In the next place the statements of the police are in the general terms, "they showed," "they told," "they had killed," etc. In this connection I must adopt the following observations of Straight, Officiating Chief Judge, in *Queen-Empress v. Babu Lal* (1) :—

It seems to me that the evidence of the constable who deposes to these so-called confessions has been most carelessly taken by the Sessions Judge, and contrary to all recognised rules as to the mode in which the testimony of witnesses should be recorded. I have more than once pointed out that it is not a proper course, where two persons are being tried, to allow a witness to say "they said this" or "they said that" or "the prisoners then said." It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding. \* \* \* Moreover, the Judge does not appear to have had present to his mind the provisions of section 27 of the Evidence Act, and seems to have accepted the statements of the constable wholesale, without the slightest regard to whether they were or were not admissible under that section.

In the present case the Sessions Judge has admitted evidence of confessions to police officers, but on the record of the police officer who was examined there is not one word as to the accused or either of them having given any information prior to their showing where the bones lay which led to the discovery of the bones. The police officer in speaking of how the bones were discovered merely said, "On the 22nd they showed where the bones were buried." Moreover, it is clear on his statement that when the accused showed where the bones were, the accused were not in the custody of the police. Consequently if the accused had made a statement which led to the discovery of the bones, section 27 of the Evidence Act would not have availed to render even so much of the information which they give as related distinctly to the fact thereby discovered admissible in evidence.

According to the Sessions trial record, the actual confessions that the accused had killed Sipat, and that they had buried his body, and afterwards removed his bones to the places where they were found, were made after the discovery, and it was not in consequence of these confessions that the bones were discovered.

The confessions therefore were not such as may be admitted under section 27 of the Evidence Act, and they must be excluded from consideration.

The fact that they or one of them pointed out where the bones lay is relevant under section 8 of the Act, but it is not in itself sufficient proof that the accused took part in the murder. The accused Kha Hlaw admitted he had pointed out the bones to the Sub-Inspector, but he said he knew the places where they were because We Do had told him of them. He alleged that Sipat's death had been caused by Krin Daw and We Do. The second accused denied that he had

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pointed out the bones to the Sub-Inspector, but said that it was that first accused who had done this.

In view of the very unsatisfactory admissible evidence on the record, I do not think the convictions should be sustained. The Sessions Judge held that Poo Sa had been present at the murder and had aided and abetted it. He does not say how he considered that Poo Sa aided in the crime, or how he abetted it in any other way. There was very little to justify a conclusion that he had entered into a conspiracy with the first accused and Saing Wan to murder Sipat and the case put forward by the prosecution witnesses is that Saing Wan and not Poo Sa instigated the first accused to kill Sipat.

The justification of the conviction of the second accused would in any case be open to much doubt.

I would allow the appeals and would acquit the accused.

Hartnoll, J.—I concur.

Before Mr. Justice Hartnoll and Mr. Justice Moore.

THEIN YIN v. FOUCAR BROTHERS & Co., LIMITED.

Civil 1st  
Appeal  
No. 423 of  
1906.

Decide 20th,  
1907.

Oraniston—for appellant (plaintiff). | Agabeg—for respondents (defendants).  
Valuation of suit, Amendment of—Court-fee.—Jurisdiction—Appeal—Lower  
Burma Courts Act, ss. 2 (h), 28 (1) c.—Suits Valuation Act, s. 8.

A brought a suit for, *inter alia*, an account, and valued the relief claimed at Rs. 600. Against the decree passed in the suit she appealed to the Chief Court, valuing the appeal at Rs. 600, for computation of court fee, and at Rs. 13,800, for purposes of jurisdiction. At the hearing she asked to be allowed to put on an extra stamp so that the stamps on the memorandum of appeal should cover a claim for Rs. 13,800.

Held,—that amendment of the valuation could not be allowed. The appeal was returned for presentation to the Divisional Court, in accordance with the original valuation of the suit.

Ma Thein Yin sued Messrs. Foucar & Co.—

- (1) for a decree ordering them to render an account of all timber dealt with by them in virtue of a power-of-attorney granted by her ;
- (2) for a decree allowing her to redeem her hammer-mark certificate on payment of such sum of money as may be found due on settlement of the said account ;
- (3) for cancellation of the power-of-attorney granted by plaintiff in favour of defendant ;
- (4) for such further relief as may be proper ; and
- (5) for costs.

She valued the suit at Rs. 600.

The District Judge has decreed that upon plaintiff paying the defendants Rs. 615, together with the interest due on Rs. 600 at 2 per cent. per mensem from the dates it was advanced up to the date of the institution of this suit, the defendants do hand over to her the power-of-attorney granted by her to their manager and her hammer-mark certificate.

Against this decree the plaintiff has appealed to this Court valuing the appeal for the purposes of the Court Fees Act at Rs. 600, and for the purposes of jurisdiction at Rs. 13,800. A preliminary objection has been taken that the appeal lies to the Divisional Court and not to this Court. Under section 28 (1) (c) of the Lower Burma Courts Act an appeal from a decree or order of a District Court shall, where the value of the suit in such Court is five thousand rupees or upwards, lie to the Chief Court, and in any other case to the Divisional Court. Under section 2 (h) of the same Act, "value" used with reference to a suit or appeal means the amount or value of the subject-matter of the suit or appeal. The plaintiff has herself estimated the value of the subject-matter in the plaint at Rs. 600. The decree certainly does not give relief to the extent of Rs. 5,000, and it is not contended that it does. It is contended that she claims the proceeds of certain timber and that she does not allow that defendants can set off anything, and she asks that in any case she may be allowed to put on an extra stamp so as to correspond with the value that she has estimated for purposes of jurisdiction. I cannot see that she is suing for the proceeds of certain timber. She asks for an account, a return of certain property and cancellation of a power-of-attorney, and she valued her suit at Rs. 600. Section 8 of the Suits Valuation Act lays down that in certain classes of suits, of which this suit seems to be one, the value determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. As the value she has given for the purposes of court-fees both in the plaint and in the memorandum of appeal is Rs. 600, it seems to me that the value for purposes of jurisdiction must be taken at that figure. I would certainly not allow her now to amend her valuation so as to bring the appeal within the jurisdiction of this Court, when neither her original valuation nor the decree shows that the value of the subject-matter is Rs. 5,000.

I would therefore order that the memorandum of appeal be returned to Ma Thein Yin to be presented to the Divisional Court.

*Moore, J.*—I concur.

*Before Mr. Justice Hartnoll.*

MI HAUKE v. KING-EMPEROR.

*McDonnell*—for appellant.

*Young*, Government Advocate.

*Search—Witnesses to search—Failure to comply with law regarding searches—  
Illegal possession—Conviction—Opium Act, ss. 14, 15—Excise Act, s. 38—  
Criminal Procedure Code, ss. 102, 103—Evidence—Written information—  
Direct Evidence—Indian Evidence Act, s. 60.*

A search under sections 14 and 15 of the Opium Act must be conducted in accordance with the provisions of the Code of Criminal Procedure, but searches to which section 38 of the Excise Act applies are regulated by the special provisions of that section and not by the provisions of the Code of Criminal Procedure.

It is objectionable to be constantly calling the same person to witness searches; and when searches are made under the Opium Act, respectable householders near to the house searched should be called as witnesses. But the circumstance that the witnesses to a search may not have been those contemplated by the Opium Act does not prevent a conviction for illegal possession of opium where such illegal possession is nevertheless proved.

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THEIN YIN  
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FOUCAR  
BROTHERS  
& Co.,  
LIMITED.

*Criminal  
Appeal  
No. 27 of  
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*June 21st,  
1907.*

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A written information is not evidence. If it is desired to make the matter contained in it evidence, a person who can directly testify to such matter must be produced.

*Ah Shee v. King-Emperor*, 3 L.B.R., 229, distinguished.

*Queen-Empress v. Taw Aung*, P.J., L.B., 369, followed.

Mi Hauk has been convicted and punished for the illegal possessions of morphia and cocaine, and appeals against the convictions. The first ground taken is that the search was illegal and that therefore under the authority of *Ah Shee v. King-Emperor* (1) the convictions should be set aside. That ruling deals with searches purported to be made under the provisions of the Burma Gambling Act, and laid down that the presumption that has to be drawn under section 7 of that Act shall not be drawn unless the search shall have been made in accordance with the provisions of sub-section (3) of section 102 and of section 103 of the Code of Criminal Procedure, 1898. It has no reference to searches under the Excise and Opium Acts as those Acts contain no provisions directing that a certain presumption shall be drawn on a search being made. It was the absence of all the provisions that must be observed before the presumption is directed to be drawn, that formed the basis of the decision in the ruling referred to. In the Excise and Opium Acts it is the mere illegal possession that is punishable, and that possession does not rest on any presumption that the law orders to be drawn. It was held in the case of *Queen-Empress v. Taw Aung* (2) that persons who make a search illegally under the Excise Act render themselves liable to be sued for damages, but this illegal action does not affect the question whether the person whose house was illegally searched has committed an offence against the Excise Act, and with that ruling I am in agreement. Under the Excise Act it would appear from the wording of section 38 of it that it is not necessary for an Excise Officer to conduct the search under the provisions of Criminal Procedure Code, for section (5) (2) of the latter Code lays down that all offences under any other law, *i.e.*, other than the Indian Penal Code, shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Since section 38 of the Excise Act, therefore describes the manner in which certain searches are to be conducted, that section would seem to regulate such searches and not the provisions of the Criminal Procedure Code. Section 16 of the Opium Act, on the other hand, lays down that searches under sections 14 and 15 of that Act shall be made in accordance with the provisions of the Code of Criminal Procedure. In the present case the witnesses seem to have been two *ayatōks* of 23rd and 26th streets, whom the Excise Officer states that he casually met. At the same time he allows that one of them has during the last year witnessed searches with him some 8, 9 or 10 times. Mi Hauk lived in 17th street. It seems to me that the witnesses, or certainly one of them, are not of the nature of those contemplated by section 103 of the Code of Criminal Procedure. It is

(1) 3 L.B.R., 229.

(2) P.J., L.B., 369.

objectionable to be constantly calling the same person to witness the search, and to do so is likely to prejudice the mind of a trying Magistrate against the prosecution. In my opinion, when searches are undertaken under the provisions of the Opium Act, neighbours or respectable house-owners near to the house searched should be called in to witness the search. In the present case, though the witnesses may not have been those contemplated by the Opium Act, yet it seems to me to be beyond doubt that the morphia was found in a cunningly constructed receptacle in the room occupied by Mi Hauk, and that she must be held to have been privy to its possession and in possession of it. The same remarks relate to the cocaine except that it would seem that it was not incumbent on the Excise Officer to call in two residents of the locality to witness the search.

Having arrived at the above finding, it is unnecessary to discuss the second and third grounds of the appeal; but I would remark as follows:—

The written information is not evidence and attention is directed to section 60 of the Evidence Act. If it is desired to make the matter contained in it evidence, a person who could directly testify to such matter should be produced as a witness. As regards the question whether the alleged confession of Mi Hauk was admissible in evidence it is not possible to say without further enquiry as to whether the Excise Officer has been enrolled as a police officer. The sentences do not seem to me to be too severe.

I therefore dismiss the appeal.

*Before Mr. Justice Harinoll.*

SIT PWAN v. NGWE THAIN.

*McDonnell*—for applicant.

*M. C. Naidu*—for respondent.

*Execution-sale, Material irregularity in—Wrong time—Proclamation—Civil Procedure Code, s. 311.*

A sale in execution of a decree was held at 8 A.M., although the hour advertized in the proclamation was 10 A.M.

*Held*,—that this was a material irregularity in conducting the sale within the meaning of section 311 of the Code of Civil Procedure.

*Basharutulla v. Uma Churn Dutt*, (1889) I.L.R. 16 Cal., 794, dissented from. *Surno Moyee Debi v. Dakhina Ranjan Sanyal*, (1896) I.L.R. 24 Cal., 291, followed.

This is an application for the revision of an order of the Divisional Court, confirming an order of the Township Court setting aside a sale that took place in execution of decree, on the ground of material irregularity in its conduct, namely, that though in the proclamation for sale the hour fixed for it was 10 A.M., it took place at 8 A.M. The only ground argued at the hearing was that on the authority of the case of *Basharutulla v. Uma Churn Dutt* (1) there had been no sale within the meaning of the Code, and so that the application would not come within the meaning of section 311 of the Code of Civil Procedure. The

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*Civil Revision*  
No. 114 of  
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(1) (1889) I.L.R. 16 Cal., 794.



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respondent quoted a later case, that of *Surno Moyee Debi v. Dakhina Ranjan Sanyal* (2), where the omission to fix an hour at all was quoted as an irregularity. I find myself unable to agree with the reasoning in the first case referred to. The sale certainly seems to me to have been conducted under the provisions of Chapter XIX of the Code. There was a proclamation and the sale was conducted by the Court. The failure to conduct the sale at the advertised time seems to me to have been an irregularity in its conduct. I am therefore unable to allow the application on this ground and so dismiss it with costs.

Civil 2nd  
 Appeal  
 No. 25 of  
 1907

July 4th,  
 1907.

Before Mr. Justice Hartnoll.

APANA CHARAN CHOWDRY v. SHWE NU.

*Pennell*—for appellant (3rd defendant). | *Lentaigne*—for respondent (plaintiff).  
*Buddhist law—Chinese customary law—Suit for pre-emption—Exemption from Indian law of succession—Indian Succession Act (1865), ss. 5, 331—Burma Laws Act (1898), s. 13.*

A claimed a right of pre-emption over certain property that had belonged to her father B, who was a Chinaman. She based her claim on Chinese customary law.

*Held*,—that (1) if B was not a Buddhist, the provisions of the Indian Succession Act, and not Chinese customary law, would apply to the property; and (2) if B was a Buddhist, the property would be exempted from the operation of the Indian Succession Act. In the latter case, in order to succeed it would be necessary for A to show that there is a Chinese Buddhist law in China applicable to Chinese Buddhists only as distinct from the customary law of the country, by which a right of pre-emption was given in respect of the land in dispute.

*Fone Lan v. Ma Gye*, 2 L.B.R., 95 referred to.

Ma Shwe Nu sues Ma Shwe Hmu, Pha Thet Hnan and Obornor Charun Chowdry for the enforcement of a right to pre-emption with respect to certain property. Her father was a Chinaman named Ahaing, and she alleges that during his lifetime he sold a piece of land to his daughter Ma Shwe Choo, now deceased, that the latter's daughter Ma Shwe Hmu and her husband, Pha Thet Hnan, have sold their land to the third defendant without her knowledge and consent, and that she has asserted her right to pre-emption without success. She therefore prays for a decree declaring her right to purchase the land. The plaint as at first drafted did not show under what law the plaintiff claimed her right and she was allowed to amend it by stating that she claimed under Chinese customary law. The Judge of the District Court held that Chinese customary law on the subject of a right to pre-emption of land, if there is such a thing, could not apply, and so dismissed the suit. The Judge of the Divisional Court held otherwise and remanded the case back for trial. Against this decision this appeal has been filed.

If Ahaing was not a Buddhist the provisions of the Indian Succession Act apply to him, and section 5 of that Act is as follows: "Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death." Hence it is clear that, if he was not a Buddhist, the law of China would not apply to this land but the law

of British India. I must therefore hold that the decision of the District Court was correct.

If Ahaing was a Buddhist, his estate would be exempted from the provisions of the Indian Succession Act by section 331 of that Act, and section 13 of the Burma Laws Act would be applicable to his estate. The right of pre-emption is clearly one concerning inheritance and so sub-section (1) of section 13 would be the sub-section applicable, which lays down that in questions regarding succession and inheritance the Buddhist law in cases where the parties are Buddhists shall form the rule of decision. In the present case the Buddhist law would not be the Buddhist law of Burma, but the Buddhist law of China that is applied to the estate of Chinese Buddhists in China, as Ahaing would be a Chinese Buddhist and not a Burman Buddhist. This view of the law has been discussed in the case of *Fone Lan v. Ma Gye* (1). If Ahaing was a Chinese Buddhist, it would be necessary for the plaintiff to show that there is a Chinese Buddhist law in China applicable to Chinese Buddhists only as apart from the customary law of the country applicable to all the inhabitants whether Buddhists or not, and that by that law there is a right of pre-emption in respect of this land in dispute. She would also have to show exactly what the law was.

Plaintiff's counsel has asked me to allow the plaint to be amended stating that Ma Shwe Nu claims under the Chinese Buddhist law applicable to Chinese Buddhists as such in China and not to dismiss the suit as he fears that limitation may bar his client from bringing another suit. It seems likely that another suit would be barred by limitation. Defendant's counsel has no objection to this course being followed. The law involved is somewhat intricate and I will allow the request.

The case will accordingly be remanded back to the District Court for retrial on the merits after the plaint has been amended as indicated above.

The costs of the two appeals, that is that in the Divisional Court and this Court, will be borne by the plaintiff-respondent. The costs in the regular suit will follow the final result.

Before Mr. Justice Fox.

#### HULOST v. KING-EMPEROR.

*Finger-prints—Finger impression slip—Proof of previous conviction—Identification—Certificate of officer in charge of Finger-print Bureau—Admissibility in evidence.*

The accused was charged with theft after three previous convictions under Chapter XVII of the Indian Penal Code. To prove these convictions, which the accused denied, certain "Finger Impression Slips" were produced, together with statements signed by the officer in charge of the Finger-print Bureau to the effect that the impressions appearing thereon were those of the person against whom the specified convictions had been had. An officer of the Finger-print Bureau took impressions of the accused's fingers in Court and identified him as the person whose finger-prints appeared on the "Finger Impression Slips."

*Held.*—that the previous convictions of the accused stated on the slips were not proved merely by the production of such slips.

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APANA  
CHARAN  
CHOWDRY  
v.  
SHWE NU.

Criminal  
Appeal  
No. 156 of  
1905.  
June 2nd,  
1905.

1905.

HULOSH  
v.  
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EMPEROR.

The appellant was convicted of theft committed after having been previously convicted of three offences punishable under Chapter XVII of the Indian Penal Code, and he was sentenced to five years' rigorous imprisonment.

The only question in the case is whether the previous convictions were duly proved. The first stated in the charge is a conviction by a Magistrate in Calcutta of theft on the 24th July 1897; the second is a conviction by the Western Subdivisional Magistrate, Rangoon, on the 27th February 1899 of the offence of dishonest receipt of stolen property; and the third is a conviction of theft by the Subdivisional Magistrate, Sagaing, on the 6th November 1901. The accused in his examination by the Court gave his name as Hulash and his father's name as Paukyam, and his residence as Kyaikto. He denied that he had ever been previously convicted. There is on the record an extract from the record of Regular Non-Bailable Case No. 182 of 1899 of the Court of the Western Subdivisional Magistrate, Rangoon, certified by the Record-keeper, which shows that on the 27th February 1899 the abovementioned Magistrate convicted (1) Godu Singh of theft in a building, and (2) Rika and (3) Muduna *alias* Tilwa and (4) Bagwun Singh of offences punishable under section 411 of the Indian Penal Code, and sentenced each of the accused to one year's rigorous imprisonment. There is also on the record what purports to be a true extract copy of a sentence passed by the Subdivisional Magistrate, Sagaing, on the 6th November 1901 on one Ma Khan, son of Lahuri, of the town of Agra for the offence of theft.

There is no document mentioned in section 511 of the Code of Criminal Procedure in connection with the conviction in Calcutta. To prove the identity of the accused with Toola Singh convicted in Calcutta in 1897, Muduna *alias* Tilwa convicted by the Western Subdivisional Magistrate, Rangoon, and with Ma Khan convicted by the Subdivisional Magistrate, Sagaing, the Finger-print Instructor at the Finger-print Bureau, Rangoon, was called. He took impressions of the accused's fingers in the Court, and after having compared them with finger-impressions on sheets which he produced from the Bureau, he declared that the accused must be the man whose finger impressions were on the sheets he produced, and whose previous convictions were entered on those sheets. He did not personally know the accused and had not himself taken the finger-impressions on the documents he produced. On this evidence the Magistrate found the previous convictions duly proved, and sentenced the accused to enhanced punishment provided for by section 75 of the Indian Penal Code. In my judgment the evidence to prove the accused's identity with the man or any of the men shown by the certified extracts of sentences to have been previously convicted was not sufficient.

Taking them in order of date, the first document produced by the Finger-print Instructor was (1) a form headed "Finger Impression Slip" having on the reverse side finger-impressions, and on the obverse, amongst other things, a statement that these impressions had been taken by Maung Kyi, a Sergeant of Police in Rangoon, on the 10th February

1899. The name of the man whose finger-impressions are on the reverse is given or was originally entered as Thuluwa Singh, son of Sudda, of Dhall Godown, Agra. To this form is attached (2) a form signed by the officer in charge of the Finger-print Bureau at Calcutta and dated the 17th February 1899, the entries in which are to the effect that the finger-impressions on the slip had been traced in the Calcutta Bureau as being identical with those of Toola Singh, son of Umroo Singh, of Madhopore villaga, Rai Bareilly, who had been convicted in Calcutta on the 24th July 1897 of theft, and had been sentenced to imprisonment for three months.

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The next document produced was (3), another "Finger Impression Slip," the impressions on which are stated on it to have been taken by Sergeant Maung Kyi on the 27th February 1899. The name and particulars of the man whose finger-impressions are on the sheet are Thuluwa Singh, son of Sudda Singh, of Puzundaung, Rangoon. The next document is another sheet on which there are finger-impressions on the reverse and entries on the obverse to the effect that those finger-impressions had been traced to Thuluwa Singh *alias* Mudma *alias* Toola Singh *alias* Makhan, son of Sudda *alias* Umroo Singh of Madhopore, Agra, and Puzundaung, Rangoon, who had been convicted in Calcutta, Rangoon and Sagaing as stated in the charges. This document is signed by the officer in charge of the Finger-print Bureau, Rangoon, and is dated the 1st February 1905.

Now, although the Instructor at the Finger-print Bureau could no doubt say with confidence that the accused must be the same man as the man whose finger-impressions were on the documents he produced, the facts stated in those documents were not proved merely by the production of the documents. The fact that the accused must have made the finger-impressions upon the documents produced would no doubt be proved by the evidence of a skilled expert, such as the Instructor may be taken to be, identifying the accused's finger-impressions taken in Court with the impressions on the sheets produced from the Bureau. The Legislature has not, however, as yet given to certificates of officers in charge of Finger-print Bureaux the force even of certified extracts by record-keepers or certificates by officers of jails mentioned in section 511 of the Code of Criminal Procedure. These latter documents prove themselves, but there is no provision to the same effect in regard to the first mentioned. Consequently the fact that the finger-impressions on the obverse of document No. 4 and on the other documents were those of a person who had been convicted of an offence had to be proved *aliunde*. For this reason I considered it necessary to take further evidence in this Court. Sergeant Maung Kyi has stated before me that he personally knows the accused, and that he took the finger-impressions of the accused on the Slip No. 3 in the Rangoon Jail after his conviction. He was unable, however, to state from his personal knowledge the exact offence of which the accused had been found guilty.

There is consequently still a gap in the evidence, and the accused is not identified even with the Muduma *alias* Tilwa mentioned in the

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extract from the record of the Western Subdivisional Magistrate, Rangoon. Holding as I do that the certificates of the officers in charge of the Finger-print Bureaux are not evidence of the facts entered in the documents, there is no evidence whatever identifying the accused with the man convicted in Calcutta and Sagaing as stated in the certificates.

I must hold that, although there is now evidence that the accused had been previously convicted of some offence, there is no evidence of his having been previously convicted of an offence punishable under Chapter XVII of the Indian Penal Code. I accordingly alter the finding to a finding of guilty of the offence of theft only, and I reduce the sentence to one of rigorous imprisonment for three years.

Before Mr. Justice Hartnoll.

MO THI AND ANOTHER v. THA KWE.

R. M. Das—for appellants (defendants).

Lentaigne—for respondent (plaintiff).

Special Civil  
 2nd Appeal  
 No. 129 of  
 1905.

July 4th,  
 1907.  
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*Buddhist Law—Right of pre-emption—Right of widow to dispose of family property subject to children's right of pre-emption.*

A claimed under Buddhist law a right of pre-emption over certain land, which had been joint family property of his father and mother, and had been sold by his mother after his father's death.

*Held*,—that the rule regarding the right of a Buddhist widow to dispose of family property after her husband's death, *viz.*, that she has an absolute right of disposal over her own share and a life interest in the remainder, does not affect but is subject to, the general rule regarding the right of all co-heirs to pre-emption. A had therefore a right of pre-emption over the whole property.

*Ma On v. Shwe O*, S.J., L.B., 378; *Maung Hlaing v. Tha Ka Do*, P.J., L.B., 65; *Tha Nu v. Kya Zan*, 2 L.B.R., 167; *Nga Myaing v. Mi Baw*, S.J., L.B., 39; *Ma Ngwe v. Lu Bu*, S.J., L.B., 76; referred to.

Maung Tha Kwe sues Ma Yu, Maung Mo Thi and Ma Shwe Hmon to enforce his right of pre-emption in receipt of a certain piece of land. The Township Court gave him a decree in respect of half the land. On appeal the District Court gave him a decree to enforce his right with respect to the whole of the land. Against this decree the present appeal has been filed. It is not disputed by either side that the land is the ancestral property of the family of Maung Tha Kwe and Ma Yu. Ma Yu is Maung Tha Kwe's mother. Tha Kwe's case is that the land was the joint property of his father, the late Ko Maung, and Ma Yu, who purchased it from Ma Yu's parents. Ma Yu's case is that the land is her exclusive property as it was given her by her mother. The Township Court found that Maung Tha Kwe's case was the true one, giving reasons. The District Court did not discuss the evidence, but it evidently agreed with the Township Court as it described the land as being joint property. The evidence on the point was not gone into on appeal, and it was allowed that the land was joint family property. It was further admitted that the Township Court was right in giving Maung Tha Kwe the right of pre-emption over half the land; but it was argued that the District Court was wrong in giving him the same.

right over the whole of it. The cases of *Ma On v. Shwe O* (1), *Maung Hlaing v. Tha Ka Do* (2) and *Tha Nu v. Kya Zan* (3) were quoted in favour of the contention.

The law relating to the right of pre-emption under Buddhist law was discussed and laid down in the case of *Nga Myaing v. Mi Baw* (4), and it was there held that a co-heir of ancestral undivided estate, should he wish to sell his share, is bound to offer it first to his co-heirs, and that a sale to strangers effected without such offer is invalid if the co-heirs promptly assert their right. Further, in the case of *Ma Ngwe v. Lu Bu* (5), it was held that after division of ancestral estate the holder thereof being a member of the family, wishing to sell the land falling to his share, must first offer it to his co-heirs, and a sale to a stranger without such offer being made is invalid. It is contested here by the appellants that Tha Kwe agreed to the sale to them. The Township Court found that he did not so agree, and it is probable that the District Court came to the same conclusion though there seems to be no definite finding by it to that effect. On perusing the evidence it seems to me that Maung Tha Kwe did not consent to the sale and objected promptly by asking the revenue surveyor not to effect the necessary mutation of names. In my opinion Maung Tha Kwe has a right of pre-emption with respect to the whole of the land and not only with regard to half of it. He appears not to have agreed to the sale to the appellants and to have asserted his rights promptly. The law on the subject is clearly quoted in the cases of *Nga Myaing v. Mi Baw* (4) and *Ma Ngwe v. Lu Bu* (5), and I agree with the decisions passed in those cases. The point in the case of *Ma On v. Shwe O* (1) had nothing to do with the exercise of the right of pre-emption. It was, what power a Buddhist widow had of disposal of the family property after the death of her husband, where children were also left. The case decided that she had an absolute right of disposal in respect of her own share and a life interest in the remainder. This decision does not seem to me to overrule the law relating to the right of pre-emption as laid down in the earlier cases quoted above. Applying the rule laid down by it to the present case it is not contended that Ma Yu cannot dispose of her own share. It is allowed that she can; but it is asserted that she must first give the other heirs the right to purchase at any figure she is willing to sell the property for, before she sells to a stranger. Her power of disposal of her share is not affected by the exercise of this special right. If a co-heir will not purchase at her figure she can sell it to another at that figure without hindrance. The same remarks can be made with regard to the second case quoted, that of *Maung Hlaing v. Tha Ka Do* (2), and the third case, that of *Tha Nu v. Kya Zan* (3). They had nothing to do with the right of pre-emption. I therefore hold that Maung Tha Kwe had a right of pre-emption with respect to the whole of the land, and so I accordingly dismiss this appeal with costs.

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(1) S.J., L.B., 378.

(2) P.J., L.B., 65.

(3) 2 L.B.R., 167.

(4) S.J., L.B., 39.

(5) S.J., L.B., 76.

Civil  
Reference  
No. 5 of  
1907.  
July 8th,  
1907.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Moore.

MAUNG NGE v. RANGANATHAM CHETTY.

McDonnell—for applicant (plaintiff). | P. N. Chari—for respondent (defendant).

Decree—Appeal—Order refusing to file award—Civil Procedure Code, s. 526.

An order refusing to file an award under section 526 of the Code of Civil Procedure is a decree and is therefore appealable.

*Mahomed Wahiduddin v. Hakimian*, (1898) I.L.R., 25, Cal., 757; *Ponnusami Mudali v. Mamdi Sundara Mudali*, (1903) I.L.R. 27 Mad., 255; *Janokey Nath Guha v. Brojo Lal Guha*, (1906) I.L.R. 33 Cal., 757; followed.

*Chintamun Sing v. Mussamat Uma Kunwar*, (1866) 2 F.B.R., 505; *Basant Lal v. Kunji Lal*, (1905) I.L.R. 28 All., 21; dissented from.

*Ghulam Khan v. Muhammad Hassan*, (1901) I.L.R. 29 Cal., 167; *Muhammad Newaz Khan v. Alam Khan*, (1891) I.L.R. 18 Cal., 414; referred to.

The following reference was made to a Bench by Mr. Justice Hartnoll :—

This is an application to revise an order of the Judge of the District Court, Tharrawaddy, refusing to order an award to be filed under the provisions of section 526 of the Code of Civil Procedure. A preliminary objection has been taken to the effect that an appeal lay from the order of refusal, and so an application in revision is not maintainable.

There seems to be a conflict of authority on the point. In the case of *Chintamun Sing v. Mussamat Uma Kunwar* (1) a Full Bench of the Calcutta High Court held that no appeal lay from an order of a Court rejecting an application to file an award; but in a later decision of that Court, in the case of *Mahomed Wahiduddin v. Hakimian* (2), it was held that an order determining that there has been no valid reference to arbitration and rejecting the application is a decree within the meaning of section 2, and that an appeal lies from such order. In the case of *Ponnusami Mudali v. Mamdi Sundara Mudali* (3), the Madras High Court held that an order refusing to file an award and setting it aside was a decree and that an appeal lay against that decree. In coming to that decision the court referred to a certain dictum of the Privy Council in the recent case of *Ghulam Khan v. Muhammad Hassan* (4), which it is stated practically concluded the matter. But the Allahabad High Court in the case of *Basant Lal v. Kunji Lal* (5) held that no appeal will lie from an order refusing to file an award made between the parties without the intervention of a Court. The learned Judges of the Allahabad High Court discussed the Privy Council case referred to above, but they relied on an earlier decision of their Lordships of the Privy Council in the case of *Muhammad Newaz Khan v. Alam Khan* (6) in forming their own views. I am personally inclined to the view that a refusal to file an award is a decree, as it is the formal expression of an adjudication on a right claimed, and is therefore appealable. In the earlier case of their

(1) (1866) 2 F.B.R., 505.

(2) (1898) I.L.R. 25 Cal., 757.

(3) (1903) I.L.R. 27 Mad., 255.

(4) (1901) I.L.R. 29 Cal., 167.

(5) (1905) I.L.R. 2 All., 21.

(6) (1891) I.L.R. 18 Cal., 414.



Lordships of the Privy Council that I have quoted they seem to have overruled the plea of *res judicata*, not upon the ground of the jurisdiction of the Court under section 525 being limited in any way, but on the ground that the validity of the award had not been raised and decided in the former proceeding.

In view of the conflict of authority the matter is one, in my opinion, for reference to a Bench, and I accordingly refer to a Bench for decision the following question :—

“ Does an appeal lie from an order refusing to file an award under section 526 of the Code of Civil Procedure ? ”

*The opinion of the Bench was as follows :—*

*Fox, C.J.*—The question referred is—“ Does an appeal lie from an order refusing to file an award under section 526 of the Code of Civil Procedure ? ” The answer depends upon whether their Lordships of the Privy Council have in the judgment in *Ghulam Khan v. Muhammad Hassan* (4) ruled definitely that an order under section 526 amounts to a decree. In view of the many conflicting decisions of the Indian High Courts on the provisions of Chapter XXXVII of the Code their Lordships were led to give their views upon the provisions of the chapter generally. Referring to cases in which the agreement of reference is made, and the arbitration itself takes place, without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to the award, the judgment says : “ In cases falling under Heads II and III proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the Court. That is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code.” These words have been the subject of much discussion. In *Ponnusami Mudali v. Mamdi Sundara Mudali* (3) a Full Bench of the Madras High Court held that they conclusively showed that an order under section 526 refusing to file an award was a decree and was appealable. In *Basant Lal v. Kunji Lal* (5) a Bench of the Allahabad High Court held that the words were intended to apply to cases where an order had been made directing an award to be filed, and not to cases where such applications had been rejected. This view was based upon an earlier decision of their Lordships in *Muhammad Newaz Khan v. Alam Khan* (6). The matter has been more recently considered by a Full Bench of the Calcutta High Court in *Janokey Nath Guha v. Brojo Lal Guha* (7). The question in that case was whether an appeal lay from an order under section 526 directing the filing of an award. The judgments in the case show much diversity of opinion, but the decision of the majority was that an appeal did lie.

The dissentient Judges conceded that an appeal lies from an order under the section refusing to file an award, but in their opinion no

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appeal lies from an order directing an award to be filed except in the cases specified in section 522.

In my opinion their Lordships of the Privy Council held in *Ghulam Khan v. Muhammad Hassan* (4) that any order under section 526 of the Code amounts to a decree and this Court is bound to follow that ruling.

I would answer the question referred in the affirmative.

Moore, J.—I concur.

Criminal  
Revision  
No. 247B  
of 1907.

Before Mr. Justice Moore.

KING-EMPEROR v. ON BU.

Opium—Beinchi—Pyaungchi—Illegal possession—Opium Rules, 1894, 1.

Beinchi or pyaungchi is now included in the definition of opium in the rules under the Opium Act, and its possession by a registered opium consumer is therefore no longer illegal, provided that the total weight of opium, including beinchi, in his possession does not exceed 3 tolas.

*Queen-Empress v. Paw Gale*, S.J., L.B., 617, referred to.

Accused has been convicted under section 9 (c), Opium Act, for illegal possession of a quarter of a tola of beinchi. Accused is a registered opium consumer. The Magistrate who convicted him was doubtless thinking of the ruling in *Queen-Empress v. Paw Gale* (1). That ruling is no longer applicable, as beinchi (or pyaungchi) is now included in the definition of opium in Rule 1 of the rules under the Opium Act, 1878. A registered consumer may therefore possess beinchi provided that the total weight of opium including beinchi in his possession does not exceed 3 tolas. In the present case the total weight of opium of all kinds possessed by accused was considerably less than 3 tolas.

The conviction and sentence are therefore set aside and accused Nga On Bu is acquitted. The fine paid will be refunded to him.

Criminal  
Appeal  
No. 471  
of 1907.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Moore.

NGA MAUNG v. KING-EMPEROR.

Murder—Culpable homicide—Intention of causing such bodily injury as offender knows to be likely to cause the death of the person injured—Indian Penal Code, s. 300 (2).

August  
13rd, 1907.

The second clause of section 300 of the Indian Penal Code only applies in special cases where the person injured is in such a condition or state of health that his or her death would be likely to be caused by an injury which would not ordinarily cause the death of a person in sound health, and where the person inflicting the injury knows that owing to such condition or state of health it is likely to cause the death of the person injured.

*Shwe Ein v. King-Emperor*, 3 L.B.R., 122 referred to.

The only question in this case appears to me to be whether the accused's crime was murder or the less grave offence of culpable homicide not amounting to murder. The learned Sessions Judge found that the accused did not strike the blow which caused Ma Shwe Sa's death with the intention of causing her death.

He also found that the accused's intention was not to cause such bodily injury as he knew to be likely to cause death. This finding is

expressed in words which might be taken to mean that the accused did not intend to cause injury likely to cause death, in which case the accused would have been entitled to be acquitted of even culpable homicide not amounting to murder, see *Shwe Ein v. King-Emperor* (1). I presume, however, that the learned Sessions Judge was considering the provisions of the second clause of section 300 of the Indian Penal Code in connection with the case, and his finding was intended to be a finding that the case did not fall within that clause.

The clause need not have been considered, for Ma Shwe Sa had no apparent infirmity and there were no circumstances which could have led the accused or any one else to believe that an injury which would not have caused death to a person of ordinary health and strength would cause death to her. As shown by illustration (b) to section 300 the second clause of the section only applies in special cases in which the person injured was in a condition or in a state of health in which an injury which would not ordinarily cause death would cause his or hers, and the person who caused the injury knew when inflicting such an injury that, owing to the condition or state of health of the person he was about to inflict the injury to, he would be likely to cause the person's death.

The finding on which the appellant was convicted of murder was that he intended to cause bodily injury sufficient in the ordinary course of nature to cause death, and the question is whether that finding was justified.

The act of the appellant which caused Ma Shwe Sa's death was a slash with a *dashè* at her back. The *da* cut into and fractured Ma Shwe Sa's left shoulder blade, and penetrated into the pleural cavity. According to the Hospital Assistant of the hospital to which Ma Shwe Sa was taken, the wound caused was 7½ inches long, 1½ inches broad and 1 inch deep. She died on the third day after the infliction of the injury. Death was due to hæmorrhage into the pleural cavity combined with shock.

The Hospital Assistant considered that the wound was necessarily a fatal one owing to the opening of the pleural cavity. Major Penny, Junior Civil Surgeon, Rangoon, who has been examined by this Court, says that there might have been a chance of Ma Shwe Sa's recovery if she had been kept quiet, and had not been moved about. He says, however, that the wound described by the Hospital Assistant was sufficient in the ordinary course of nature to cause death. He also says that to have caused the result it did, the blow with the *dashè* must have been dealt with very considerable force.

A man who strikes at the back of another a violent blow with a weapon such as a *dashè* must, I think, be taken to know that he is doing an act imminently dangerous to the life of the person at whom he strikes, and that a probable result of his act will be to cause that person's death.

He must be held responsible for the natural consequences of his act, and be taken to have intended them.

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His knowledge or want of knowledge of the details of the injury he will probably cause, and of their results, is immaterial. He takes all the ordinary risks of his act. He intends to do an act attended with risk to another human being's life. An ordinary risk attendant on slashing with a *dashè* at the back of another human being is that the striker will cause the person struck injury sufficient in the ordinary course of nature to cause death. The striker must under the circumstances be taken to have intended to cause such injury. Therefore the accused's offence was *prima facie* that of murder. The accused in his appeal alleges that he was provoked by Ma Shwe Sa. I cannot hold that Ma Shwe Sa gave any cause for sudden and grave provocation which should have been sufficient to deprive the appellant of his power of self-control. He says she committed a breach of etiquette amongst Burmese in even asking him in public to consent to his sister marrying Po Kywe. A mere breach of etiquette cannot be held to constitute grave and sudden provocation excusing a person losing all power of self-control.

From the evidence, however, it is evident that Ma Shwe Sa did more than commit a breach of etiquette. She appears to have used taunting words to the appellant containing an innuendo derogatory to his sister's virtue. I cannot hold that the provocation which these words probably caused was sufficiently grave to prevent the accused's offence from amounting to murder, but the words probably did give rise to violent passion in the accused, and led him into his passionate act. With some hesitation I think that the accused's crime does not call for confirmation of the death sentence.

I would confirm the conviction, but would alter the sentence to one of transportation for life.

Moore, J.—I concur.

Before Mr. Justice Ormond.

Criminal  
Revision  
No. 302B of  
1907.

ANA DEWA SING AND 28 OTHERS v. KING-EMPEROR.

Lentaigne—for applicants. | McDonnell, Assistant Government Advocate.

October 1st,  
1907.

Search—Entry—Presumption from discovery of instruments of gaming—Common gaming-house—List of things seized in search—Burma Gambling Act, 1899, ss. 6, 7—Criminal Procedure Code, 1898, s. 103.

No presumption arises under section 7 of the Burma Gambling Act unless the search, as well as the entry, is made in accordance with the provisions of section 6 and consequently in accordance with the provisions of sections 102 (3) and 103 of the Criminal Procedure Code.

Where a list of articles seized in a house entered under section 6 of the Gambling Act was written on three sheets of paper, the first of which only was signed by the witnesses, it was held that only the articles mentioned on the first sheet had been seized in accordance with the provisions of section 103 of the Criminal Procedure Code; and as no instruments of gaming were mentioned in that sheet, it followed that no instruments of gaming had been seized at a search made in accordance with the provisions of section 6 of the Gambling Act, and that therefore the presumption provided for in section 7 did not arise.

The accused have been convicted under the Gambling Act—some under section 11 for being present in a common gambling-house for

the purpose of gaming ; and others under section 12 for keeping a common gaming-house. The Rangoon Chinese Club was searched under section 6 and instruments of gaming were found on the premises. Section 7 provides that when any instruments of gaming are found in a house entered under the provisions of section 6 it shall be presumed, until the contrary is proved, that such house is used as a common gaming-house and that the persons found therein were then present for the purpose of gaming. It is upon this presumption along that the convictions can stand ; and if the provisions of section 6 have not been strictly complied with, the presumption cannot be raised. Under section 6 of the Act the search must be made in accordance with the provisions of sub-section (3) of section 102 and of section 103 of the Criminal Procedure Code. Under section 103 of the Code the search must be made in the presence of two or more respectable inhabitants of the locality ; a list of all things seized in the course of the search must be made and such list must be signed by the above witnesses. In the present case a list was made upon three separate sheets of paper, the first of which only has been signed, and no instruments of gaming are mentioned on that sheet. There is nothing to show that the signatures were intended to refer to anything stated outside that one sheet. In effect therefore there is no list made under the provisions of section 103 of the Code relating to instruments of gaming ; and consequently no instruments of gaming can be said to have been found upon the premises under the provisions of section 6 of the Act. Section 7 of the Act does not expressly say that the search (as well as the entry) must be made under the provisions of section 6 ; but I think it is clear, and there are authorities to shew, that unless the search is made in accordance with the provisions of section 6, the presumption mentioned in section 7 does not arise. The convictions therefore must be set aside ; the fines if paid must be refunded, and the money and things seized must be returned.

*Before Sir Charles Fox, Chief Judge.*

KING-EMPEROR v. MYAT AUNG.

*Security proceedings—Preventive sections—Order on evidence recorded by predecessor—Security for more than one year—Submission of proceedings to Sessions Judge—Order of Sessions Judge—Period of imprisonment in default of security—Criminal Procedure Code, 1898, ss. 118, 123, 350.*

When a Magistrate makes an order under section 118 of the Criminal Procedure Code requiring an accused person to give security for more than one year, the Magistrate himself has no power to pass any order for imprisonment in default of the security being given. He can only issue a warrant for the detention of the accused pending the orders of the Sessions Judge.

The proceedings in such a case are not laid before the Sessions Judge for confirmation of an order, but for the purpose of his passing an order himself under section 123 (3) of the Criminal Procedure Code.

The period for which imprisonment in default of giving security is ordered must coincide with the period for which security is demanded.

On the 6th February the then Subdivisional Magistrate called upon the respondent to furnish security for good behaviour for two

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years, but made no order for laying the proceedings before the Sessions Judge.

On the 1st February the Magistrate's successor directed that this should be done.

By his order of the 27th March the Sessions Judge set aside the order directing the accused to give security, and directed the Magistrate, after recording evidence for the defence, to proceed to pass a fresh order.

The Sessions Judge overlooked the fact that the case would not be dealt with on remand by the Magistrate who heard the witnesses against the accused. When it was taken up again yet another officer held the post. There is nothing on the record to show that this Magistrate gave the accused an opportunity of exercising his right to have the witnesses against him resummoned and reheard. The Magistrate took the evidence of the defence witnesses and then upon evidence taken by one of his predecessors passed another order requiring security for two years, and directing that in default of giving it the accused should be imprisoned for one year. This obviously wrong order was passed on the 17th June. On the 29th June the Magistrate committed the accused to rigorous imprisonment for the term adjudged, but directed that the case should be laid before the Sessions Judge for confirmation. An order was passed by the Sessions Judge on the 2nd August confirming the Magistrate's order. This was not a proper order. When a Magistrate makes an order requiring an accused to give security for over a year, the Magistrate is not himself empowered to pass an order for imprisonment in default of the security being given. All he is empowered to do is to issue a warrant directing that the accused be detained in prison pending the orders of the Sessions Judge. If, after examining the proceeding, hearing the accused, and obtaining such further information or evidence as he thinks necessary, the Sessions Judge considers that the Magistrate's order for security was a proper order, it is for the Sessions Judge to pass an order that the accused suffer imprisonment rigorous or simple according to the provisions of sub-sections (5) and (6) of section 123 of the Code of Criminal Procedure if the security is not given or until it is given. It is of course open to the Sessions Judge to hold that the case is not one in which the taking of security is called for, or that the necessity for taking security has not been duly proved. He may also reduce the amount of security required by the Magistrate and the period for which the Magistrate has required security, but in the final order the period for which the accused is to be imprisoned in default of giving security should always coincide with the period for which security is demanded.

In the present case the Sessions Judge has confirmed an order of the Magistrate which was itself wrong. The case was not before the Sessions Judge for confirmation of an order. It was before him for the purpose of his passing an order under sub-section (3) of section 123.

There is on the record a warrant of imprisonment signed by the Sessions Judge which states that the accused had been ordered by the

Sessions Court to be rigorously imprisoned for one year, but there is no order on the record authorizing such warrant.

The proceedings have been irregular throughout, and the accused has suffered rigorous imprisonment for a considerable time under a series of illegal orders and warrants. The order and warrant of the Sessions Judge, dated the 2nd August 1907, are set aside. The accused will be released.

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*Before Mr. Justice Irwin, C.S.I.*

HAKIM ALLY v. KING-EMPEROR.

S.C. Dutta—for applicant.

Criminal  
Revision  
No. 264B of  
1907.

November  
22nd, 1907.

*Power of Magistrate to order prosecution of offender not arrested by police—  
First information report—Final report—Criminal Procedure Code, 1898,  
ss. 157, 159, 169, 170, 173, 190, (1) (c).*

In a case sent up by the police, the Magistrate acquitted the accused, but ordered that another person should be sent up for trial. The Magistrate was not empowered under section 190 (1) (c) of the Criminal Procedure Code to take cognizance of offences of his own motion.

*Held*,—that the Magistrate, although not so empowered, was competent to order the prosecution of any person implicated on receipt of the first information report from the police, and *a fortiori* after having received the final report and having himself examined witnesses.

*King-Emperor v. Nga Po Thin*, 2 L.B.R., 146, referred to.

The Magistrate tried Abdul Jabar for criminal trespass, acquitted him, and at the end of his judgment wrote : "But I order that police will take action against Hakimulla, who has with a deliberate intention entered upon to oust the complainant of the land which he has innocently purchased from Supaya." The Magistrate was called upon to report under what provision of law he acted in ordering the prosecution of Hakimulla. Apparently the record was not sent to him for reference, for he reports that from his memory he did not order Hakim Ally to be prosecuted, but remarked that he ought to be prosecuted, and sent the record to the officer in charge of the police-station for perusal and necessary action. He is not empowered under section 190 (1) (c) of the Code of Criminal Procedure.

The Magistrate, Maung Kaing, was Township Magistrate of Kungyangôn, and was empowered to take cognizance of cases on police report under section 190 (1) (b) of the Code of Criminal Procedure. The first information in the present case would in the ordinary course be submitted to him under section 157 of the Code of Criminal Procedure, and on receiving such report he could, under section 159, direct an investigation, or hold a preliminary enquiry, or proceed otherwise to dispose of the case under the provisions of the Code. Thus he could, under that section, have proceeded at once to try Hakimulla without waiting for any final report from the police.

The police final report was submitted in due course to the Magistrate. It was a report sending up Abdul Jabar for trial. There are three sections in the Code relating to final reports, *viz.*, 169, 170 and 173. Section 169 relates to cases in which no person is sent up for trial, 170 to cases in which some person is sent up, and 173 contains



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general directions relating to both. The three sections must be read together.

When an accused person has been released on his bond the Magistrate shall make such order for the discharge of the bond, or otherwise, as he thinks fit. It is clear from the words "or otherwise" that the Magistrate can on such a report order the prosecution of the person who has been released. And it appears to me to be quite clear that the power of the Magistrate to order a prosecution does not depend on the question whether the police have arrested the person who in the Magistrate's opinion, ought to be put on his trial. The Magistrate's powers in this respect are quite as wide under section 173 as under section 159. And with good reason; after receiving the final report, and *a fortiori* after taking evidence, he is in better a position to know what the police ought to do than on receiving only the first information report. Clause (c) of section 190 (1) has nothing to do with this case because the Magistrate had the report of a police officer before him—*King-Emperor v. Nga Po Thin* (1). It is part of the daily duty of Township Magistrates to receive both first and final reports of the police and to pass orders upon them. It would be a mere farce to tell a Magistrate that he has such a duty to perform if he may not correct a mistake made by the police in sending up the wrong person for trial.

The application to set aside the Magistrate's order is dismissed.

Before Mr. Justice Irwin, C.S.I.

RAMZAN ALI v. OPORTO CHARAN CHOWDRY.

Lambert—applicant.

Civil Revision  
No. 145 of  
1907.

November  
28th, 1907.

Power of High Court in revision—Jurisdiction—Revision of Civil Court's sanction to prosecute—Criminal Procedure Code, ss. 105 (6), 459.

The District Court sanctioned the prosecution of the applicant for giving false evidence. He thereupon applied to the Chief Court on the Criminal Side to revise the order of the District Court in exercise of the powers conferred by section 439 of the Criminal Procedure Code.

Held,—that this section did not confer jurisdiction to interfere with the order of a Civil Court.

*Nazir Hasan v. Dost Muhammad*, (1903) I.L.R. 26 All., 1, dissented from;  
*In re Chennanagoud*, (1902) I.L.R. 26 Mad., 139; *Kali Prosad Chatterjee v. Bhuban Mohini Das*, (1903) 8 C.W.N., 73; followed.

The District Court of Akyab granted sanction to prosecute Ramzan Ali for offences under sections 193, 196 and 471 of the Penal Code. Ramzan Ali applies to have the sanction revoked. The petition is headed as Criminal Revision. It is admitted that under section 195 (6), Code of Criminal Procedure, the sanction could be revoked by the Divisional Court of Arakan, and no application has been made to that Court, but it is contended that independently of that provision of law the High Court on the Criminal Side has jurisdiction under section 349, Code of Criminal Procedure, to revise the order of the District Court.

In support of this view the petitioner cites *Nazir Hasan v. Dost Muhammad* (1), in which a bench of the High Court of Allahabad dissented from the opinion of a single Judge of the Madras Court expressed in *In re Chennanagoud* (2). The Madras ruling, however, was followed by a bench of the Calcutta High Court in *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (3), and I have no hesitation in agreeing with the Madras and Calcutta Courts. The Code relates to the procedure of Criminal Courts, and I can find no indication in Chapter XXXII that it gives the High Court power to interfere with the proceedings of a Court which is not, *qua* the Code of Criminal Procedure, subordinate to it. It is admitted that sanction to prosecute, given by a public servant who is not a judicial officer, cannot be revoked by the High Court, and this seems to me to demolish the ground of the Allahabad decision. Extending the period during which sanction remains in force seems to be an act of a totally different nature from revoking a sanction.

I find that this Court has no jurisdiction to entertain the present application under section 439 of the Code of Criminal Procedure. It is not contended that there are any sufficient grounds for taking action under section 622 of the Civil Procedure Code. The application is dismissed.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. A. C. DASS.

Government Advocate—for the King-Emperor.

Jordan—for respondent.

*Danger caused by disobedience of railway rules—Responsibility of Station Master—Consequences of disobedience of rules—Collision—Indian Railways Act, 1890, s. 101.*

A, an Assistant Station Master, allowed the signal to be given for a train to run through his station without satisfying himself, as required by the rules made under the Railways Act, that all the prescribed precautions had been taken by the jemadar subordinate to him. The train was switched off the main line on to a line on which some waggons were standing, and collided with them. This could not have occurred if the rules had been complied with. A was tried, under section 101 of the Act, for having, when on duty, endangered the safety of persons travelling in the train by disobeying general rules. He was convicted, and fined Rs. 30, the Magistrate remarking that he considered his offence merely technical and that the collision was practically the result of the acts and omissions of the jemadar.

*Held*,—that the Magistrate's view of the relative responsibility of A and the jemadar was, in view of their relative positions, radically wrong, and that A was the more guilty of the two.

*Held, further*,—that the essence of the offence was the danger or risk entailed by the neglect of the rules irrespective of the consequences that actually ensued.

A substantive sentence of imprisonment was passed upon A.

*Snell and Seddons v. The Queen*, (1883) I.L.R. 6 Mad., 201; *Burma Railways Company v. Fox*, Criminal Revision No. 1500 of 1901 (unreported); referred to.

The charge on which A. C. Das was tried was that he, on 8th February 1907 at Pyinbongyi, by disobedience of general rules, caused

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v.  
OPORNO  
CHARAN  
CHOWDRY.

Criminal  
Revision  
No. 321B of  
1907.

November  
29th, 1907.

(1) (1903) I.L.R. 26 All., 1.      (2) (1902) I.L.R. 26 Mad., 139.  
(3) (1903) 8 C.W.N., 73.

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the collision of a train with waggons and endangered the safety of persons in it, an offence under section 101 of the Indian Railways Act, 1890. He was convicted and fined Rs. 30. The Government Advocate, under instructions from the Local Government, applies for enhancement of the sentence.

The judgment does not contain a statement of all the material facts. In order to ascertain them I have had to read the depositions and the examination of the accused. It is not apparent why the examination of the accused was recorded in Burmese. That is not his mother tongue, and he presumably spoke English in Court.

The charge is defective. A minor point is that the accused ought to have been described by his full name, not by initials. The charge ought to have set out that he was Assistant Station Master, and on duty. The rules which he disobeyed ought to have been specified. I cannot ascertain from the record that the rules were before the Magistrate at all. The learned Government Advocate produced them at the hearing of the appeal.

The facts as they appear on the record are these. At Pyinbongyi station there are four line. The second line is the main line which runs straight through the station. The first facing points which a down train (travelling north to south) meets are the points of the first or platform line. About 15 yards south of these points are the points by which the third line branches off from the main line. At the first, or platform line, facing points is the line clear post where the line clear for the section Pyinbongyi to Payagyi is given to the driver of a down train which does not stop at Pyinbongyi. The line clear is struck in a cane hoop to enable the driver of the moving train to pick it up.

On the 8th February 1907, about 5 to 5-15 A.M., the No. 4 down mail train approached Pyinbongyi station. At that time No. 155 up goods train was standing in the station on the platform line, and six waggons which had been detached from it were standing on the third line near the north points. It is the jemadar's duty to set points when shunting. He had set the points to shunt the six waggons. After doing this it was his duty to set both the facing points for the main line, lock the points and return the keys to the Assistant Station Master, and then himself go to the trailing points at the south end of the station. This he did not do. The first facing points were set correctly. The second facing points were set for the third line, and the key left in the lock. The jemadar stayed at the first facing points and told the porter to lower the signal, which he did. The Assistant Station Master went to the first points and gave the line clear to the driver. The train ran on to the third line and collided with the waggons. The porter's evidence is this:

The Assistant Station Master asked me to bring the ratan hoop. I gave it to him. Then he went to the second line to the point. Little while after the jemadar showed me a green light and shouted to me and I lowered the signal. This is the way I have been working daily. The Assistant Station Master never shows a green light to me.

Now I turn to the rules framed under the Railways Act. In these rules various duties are imposed on the Station Master or other railway servant appointed by the authorized officer. There is no suggestion in this case that any person except the Assistant Station Master Dass was appointed to perform any duties of a Station Master. I therefore read the rules without noticing any reference to persons so appointed.

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Rule 113 (1) reads thus:

The Station Master will be responsible that all facing points over which a train will pass are correctly set and secured, and trailing points correctly set.

Under that Rule, subsidiary rule (f) (iii) reads thus:

When a train runs through, or is timed to run through, any station, without stopping, the Station Master must inspect all facing points over which the train will run, and is personally responsible that all such points are set correctly and locked for the running through train.

Rule 91 (2) reads thus:

The Station Master shall be held responsible that the signals are not lowered to admit a train until all facing points over which the train will pass are correctly set and secured.

Under this Rule, subsidiary rule (a) (i) reads thus:

No Home or Outer signal is to be lowered for the admission of any train unless the Station Master has satisfied himself that, in the case of a "running through" train, the keys of all facing points over which the train will pass are in his possession; secondly, that he has complied with the instructions laid down in subsidiary rule (f) (iii) under general Rule 113.

Rule 11 (i) (a) reads thus:

Every certificate issued at a station under Rule 8, clause (2)—i.e., a line clear certificate—shall be delivered by the Station Master, if the train runs through the station without stopping, to the driver.

The importance of the rule that the Station Master must have the keys of the facing points in his own possession is seen from the evidence of the driver, J. R. Hall, who explains that the key of the third line facing points cannot be taken out of the lock except when the points are set for the main line.

Now the Assistant Station Master's duty is clear. He had to first inspect the facing points of the platform and third lines, see that they were correctly set for the main line and locked and that the keys of both points were in his own possession. Until this was done he should not have allowed the signals to be lowered, much less have given the line clear to the driver. He did not inspect the points although he passed close by them. The keys were not in his possession. The jemadar in his presence called to the porter to lower the signals, and Dass does not even allege that he told the porter not to do so. Finally he gave the ticket to the driver. His excuse is that after writing out the line clear in triplicate he had no time to examine the points. This is simple nonsense. If he had time to reach the line clear post he had time to examine the points on the way, and nothing could excuse his allowing the signals to be lowered before he had the keys of the points in his possession. The fact that he delivered the

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line clear certificate shows that he acquiesced in the lowering of the signals, and if the porter is to be believed this disobedience of rules by Dass was not an isolated instance but habitual.

The jemadar and the guard of the goods train also disobeyed rules, and the three are jointly responsible. The jemadar and guard absconded. The Magistrate wrote: "The acts or omissions of the absconders are much more serious than what may be attributed to Dass," and again, "as it is shown that the train came in practically through the act of another I would view what occurred so far as Dass is concerned as a technical offence."

This view of the case is radically wrong. When a superior is lax his inferiors will certainly be lax too. The strict observance of the rules framed to ensure the safety of trains is of such enormous importance to the travelling public that leniency is out of the question and much more so in the case of a Station Master than in the case of a jemadar who is subject to constant and detailed supervision. I consider that Dass is more guilty than the jemadar.

The insertion in the charge of the words "caused the collision of a train with waggons" was in my opinion not merely superfluous but undesirable, and the Magistrate's remarks about the probable consequences of setting the points wrong show that he did not understand clearly the nature of the offence for which he was trying the accused. The offence was endangering the safety of any person, and that offence would equally have been committed if the driver had succeeded in stopping the train before it reached the waggons. In *Snell and Seddons v. The Queen* (1), the learned Judges said:—

The appellants are liable to conviction, not by reason of consequences directly referable to their default, but by reason of the danger or risk which it entails.

The present application was made nearly five months after the conviction. In the *Burma Railway Company v. Fox* (2), which was an application for an order to the Magistrate to make further inquiry into an offence under the Railways Act, the learned Judge said that an application for revision by prosecutors should not be entertained after the period (six months) allowed by the Limitation Act for an appeal against an acquittal has elapsed, except perhaps under very exceptional circumstances. In this case the period of six months has not been exceeded, but it is 10½ months since the offence was committed. In consideration of this fact I shall pass a much more lenient sentence than I think the Magistrate ought to have passed, but the offence was in my opinion such a grave one that I should consider myself to some extent responsible for the next accident that occurs on the Burma Railway through similar disobedience of rules if I did not pass a sentence of imprisonment.

The fine of Rs. 30 was paid. I sentence Dass to fifteen days' rigorous imprisonment in addition to the fine.

(1) (1883) I.L.R. 6 Mad., 201.

(2) Criminal Revision No. 1500 of 1901.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v.

1. BA PE.
2. SHWE PAN.
3. PO SAN.
4. PO AN.
5. PO TU.
6. KO PAW.
7. NGA TOK.

Criminal  
Revision  
No. 395B  
1907.

December  
3rd,  
1907.

*Duty of High Court in revision—Omission to examine the accused—Criminal Procedure Code, 1898, ss. 342, 439 (5).*

It is not imperative on the High Court to set aside every void order that comes to its notice, when the person aggrieved does not move the Court to do so.

Where certain persons were convicted without being duly examined under section 342 of the Criminal Procedure Code, but it nevertheless appeared from the record that they had not been prejudiced by the omission, and they had not appealed although an appeal lay.

*Held*,—that though the conviction was bad it was not necessary for the High Court to set it aside,

*King-Emperor v. Kyan Baw*, 2 L.B.R., 239, distinguished.

*King-Emperor v. Yena*, 4 L.B.R., 49, referred to.

*Crown v. Po Maung*, 1 L.B.R., 362, followed.

Shwe Pan and six others were tried and convicted of offences under the Gambling Act, sections 11 and 12. The Magistrate omitted to examine the accused as required by section 342, Code of Criminal Procedure. For this reason the District Magistrate recommends that the convictions be set aside, citing *King-Emperor v. Kyan Baw* (1).

Doubtless the trial was bad by reason of the omission, but it is not imperative on the High Court to set aside every void order which comes to its notice, when the person aggrieved does not move the Court to do so. In *King-Emperor v. Yena* (2), we refrained from interfering with an order of acquittal made by a Court which had no jurisdiction to make it. In the present case the accused did not petition either the District Magistrate or this Court. Indeed, if they had done so this Court could not have entertained the petition, because they had a right of appeal and did not exercise it—section 439 (5), Code of Criminal Procedure.

From the record it appears that the accused, though they were not examined, stated, the substance of their defence when the charge was stated to them under section 242, and they called witnesses in defence. It does not appear that they were prejudiced by the omission to examine them, and as they might have appealed but did not, I see no reason to set aside the convictions.

The sentences in default of payment of fine were contrary to section 65 of the Penal Code. One of these sentences has not yet expired: it has been suspended by the District Magistrate. This particular illegality cannot be passed over—*Crown v. Po Maung* (3). I reduce the sentence on Ba Pe, in default of payment of fine under section 12 of the Gambling Act, to 21 days, and as he has suffered more than that period I direct that his recognizance bond be cancelled.

(1) 2 L.B.R., 23. | (2) 4 L.B.R., 49. | (3) 1 L.B.R. 362.

Criminal  
Revision  
No. 290B of  
1907.

Before Mr Justice Irwin, C.S.I.

J. F. BRETTO v. RANGOON MUNICIPAL COMMITTEE.

Giles—for applicant. | Eddis and Jordan—for respondent.

December 6th,  
1907.

Order of Municipal Committee—Uninhabitable premises—Prosecution—  
Challenge of legality of order—Decision as to fitness of premises for use—  
Burma Municipal Act, ss. 130, 147, 180.

A was ordered by the Municipal Committee, under section 130 of the Burma Municipal Act, to refrain from using certain premises, which were considered to be unfit for human habitation, until the Committee was satisfied of their fitness for use. He carried out some repairs, but let the premises to a tenant before doing all that the Committee considered necessary. He was prosecuted and convicted, under section 180 of the Act, of disobedience of the order, the Magistrate holding that, by virtue of section 147 the propriety or legality of the order could only be questioned in an appeal to the Commissioner. A applied to the Chief Court for revision.

*Held*,—that the words "no such order shall be liable to be called in question otherwise than by such appeal," in section 147 of the Act, do not debar an accused person from pleading as a defence to a criminal prosecution that the order is *ultra vires*.

*Held, further*,—that that part of the order which required that the Committee should be satisfied as to the fitness of the premises before their use was *ultra vires*. The question whether the house had been rendered fit for habitation was not a matter for the Committee's decision, but a question of fact to be decided by the Magistrate on the evidence.

A notice dated the 31st July 1906 and signed by the Municipal Health Officer, was served on Mr. Bretto on the 4th September 1906. The notice is in these terms,—

To Mr. J. F. BRETTO,

Owner  
Occupier of No. 27, 42nd Street.

Whereas the premises above named appear to the Municipal Committee of Rangoon to be unfit for human habitation, in consequence of its insanitary condition, this is to give you notice that the said Committee, in exercise of the powers conferred upon it by section 130 of the Burma Municipal Act, 1898, hereby prohibits you from using the said premises, or suffering them to be used, for human habitation after three months from the receipt of this notice, or until such time as the said Committee is satisfied that the said premises have been rendered fit for such use.

*Note*.—You are hereby warned that no repairs of any kind may be commenced until written permission has first been obtained from the Municipal Engineer.

On the 29th October 1906, Mr. Bretto acknowledged the receipt of the notice, and reported that house had been thoroughly cleaned and painted, and was open to inspection.

On the 30th November 1906, the Health Officer replied that something further was required to make the building sanitary. Further correspondence ensued. Mr. Bretto let the house to a tenant about the end of December.

On the 21st May 1907, the Committee instituted a prosecution for disobedience of the notice, under section 180 of the Municipal Act. The complaint, after setting out the principal directions contained in the notice, alleged "that the accused has failed to comply with the said notice."



Lengthy evidence was adduced by the Committee to prove that the accused did not put the house into a sanitary condition, and by the accused to prove that he did. After hearing the arguments of counsel, however, the Magistrate came to the conclusion that it was not necessary to consider the evidence at all, because it was contended on behalf of the Committee that, whether in fact the house was in a sanitary state or not, Mr. Bretto committed an offence by permitting his tenant to use the house before the Committee were satisfied that it was fit for habitation.

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A ruling under the Calcutta Municipal Act was cited on the part of the Committee, but the Magistrate does not seem to have regarded it as of much consequence, and in fact it is not in point at all, as both the substantive law and the procedure laid down in the Calcutta Act are widely different from those contained in the Rangoon Act.

The Magistrate convicted the accused and fined him one rupee ; and the ground of his decision is that section 147 enacts that no order made under section 130 shall be liable to be called in question otherwise than by appeal to the Commissioner under section 147. Mr. Bretto applies to have the conviction reversed.

If the Magistrate's construction of the law is correct it follows that no matter how illegal, *ultra vires*, or even absurd the Committee's order may be, the Magistrate is bound to convict of disobedience of it, unless it has been set aside by the Commissioner on appeal. That this is the logical consequence of the Magistrate's finding is admitted by the learned advocate for the Committee. It would require very cogent reasons to uphold such a decision as this.

The words of section 180, so far as they relate to the present case, are as follows : "Whoever disobeys any notice in writing lawfully issued by the Committee under the powers conferred upon it by the last foregoing chapter shall be punishable," and so forth. The construction of section 147 contended for by the Committee makes the word "lawfully" in section 180 mere surplusage, and requires that the latter section should be construed as if it ran thus, "Whoever disobeys any notice in writing issued by the Committee and purporting to be issued under the powers conferred upon it by the last foregoing chapter." At first sight there seems to be a conflict between the two sections. The duty of the Court is to endeavour to reconcile them in such a way as shall do least violence to the language of both.

The expression "called in question" might no doubt be construed in its widest sense as including not only a direct challenge in a proceeding instituted for that purpose by the person aggrieved, but also a challenge made by way of defence to a civil action or a criminal charge. But such a construction is not the only possible one, and it cannot be adopted if it is plainly contrary to the context or to other sections of the same act. To hold that it includes the defence to a criminal prosecution is to make an absolute nullity of the word "lawfully" in section 180, and to reduce that section to an absurdity. I cannot accept this construction.

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COMMITTEE.

The notice issued by the Committee is open to criticism in more points than one but for the purposes of this case the only part which need be discussed is the prohibition from using the house "until such time as the said Committee is satisfied that the said premises have been rendered fit for use." This prohibition is *ultra vires*. The section makes the Committee the judge of the question whether the house is in the first instance, unfit for human habitation, but another section (147) allows an appeal to the Commissioner on that point. When the owner or occupier has done what he thinks, or alleges he thinks, to be sufficient to make the house sanitary and habitable, if the Committee differ from him the law does not allow either party to appeal to the Commissioner, and the reason apparently is that section 130 does not make the Committee the judge of the question whether the house has been made fit for habitation. It is a question of fact, to be decided by the Magistrate if the Committee see fit to prosecute.

The conviction therefore cannot be upheld without examining the evidence to ascertain whether it is proved that Mr. Bretto did not make the house fit for human habitation. I do not consider it necessary to do this. The Committee never pressed for more than a nominal penalty. The prosecution was instituted several months after the house had been let. The Committee have not complained of the Magistrate's action in ignoring the evidence and dealing only with the point of law.

I therefore set aside the conviction and sentence, and acquit the applicant, and direct that the fine be refunded.

Before Mr. Justice Irwin, C.S.I.

PWA THIN v. BA WIN.\*

May Oung—for applicant.

Criminal  
Revision  
No. 397B of  
1907.

December 6th  
1907.

Maintenance, Ground for refusing order for—Buddhist Law: Husband and wife—Polygamy—Refusal to live with husband and second wife—Criminal Procedure Code, s. 488.

Polygamy being legal among Burmese Buddhists, the refusal of a chief wife to live with her husband merely because he has taken a second wife is a proper ground for refusing to make an order for her personal maintenance under section 488 of the Code of Criminal Procedure.

*Ma The v. Maung Tha E*, 1 U.B.R. (1897—1901), 104, referred to.

The petitioner refused to live with her husband because he had taken a second wife. In consequence of this refusal the Magistrate held that she is not entitled to maintenance for herself. It would be more correct to say that she is not entitled to an order for maintenance for herself under section 488, Code of Criminal Procedure. This is clearly what the Magistrate meant.

It is urged that the Magistrate did not correctly exercise the wide statutory discretion given him by the proviso to sub-section (3) of section 488. The main contention of the learned advocate is that polygamy is not regarded with favour by respectable Burmese Buddhists, and that Magistrates ought not to encourage it by refusing an order for maintenance to a first wife who refuses to live with her husband because he has taken a second wife.

Overruled *Ma Ka U v. Po Saw*, p. 340.

In *Ma The v. Maung Tha E* (1), the learned Judicial Commissioner of Upper Burma held that a second wife has no kind of reasonable ground for complaint whatever by reason of her husband marrying a third wife. That is a proposition which cannot be gainsaid, and I have no hesitation in going further and saying that the Magistrate was right in holding that while polygamy is legal the refusal of a chief wife to live with her husband merely because he has taken a second wife is a proper ground for refusing to make an order for her personal maintenance under section 488 of the Code of Criminal Procedure.

The petition is dismissed.

*Before Mr. Justice Irwin, C.S.I.*

KING-EMPEROR *v.* { 1. SAN E.  
2. SAN YA.  
3. NGA SEIN.  
4. THEIN PE.

*Commencement of sentence of imprisonment—Concurrent sentences—Criminal Procedure Code, ss. 35, 397.*

A sentence of imprisonment cannot be ordered to run concurrently with another sentence not passed at the same trial.

In sentencing the accused to imprisonment the Magistrate directed that the term of imprisonment should run concurrently with any other term they might be serving. This order was illegal; section 35, Criminal Procedure Code, does not authorize any Court to direct that two or more sentences shall run concurrently except sentences passed at one and the same trial. Section 397 is explicit, and gives the Court no option; a sentence of imprisonment must commence at the expiry of the previous sentence.

In the present case it is not necessary to take any action, as the convictions were set aside on appeal.

*Before Mr. Justice Irwin, C.S.I.*

NGA PAING ALIAS KYA BU *v.* KING-EMPEROR.

The Assistant Government Advocate—for the King-Emperor.

*Robbery—Theft—Causing hurt to effect escape—Indian Penal Code, s. 390.*

A stole some rice from a house. While carrying it away he was seized by B. He thereupon dropped the rice and then stabbed B with a knife. He was convicted of voluntarily causing hurt in robbery, under section 394, Indian Penal Code, and appealed to the Chief Court.

*Held*,—that as A dropped the rice before stabbing B, he could not have caused the hurt for the purpose of carrying away the rice, and his offence was therefore not robbery. The conviction was altered to one of theft after making preparation for causing hurt under section 382, Indian Penal Code, and of voluntarily causing hurt with a knife under section 324, Indian Penal Code.

There is no doubt about the correctness of the finding of facts. I admitted the appeal because I doubted whether the facts constitute robbery. The facts are these. Appellant stole some rice from a house. As he was carrying the rice away Sipaw seized him. He

1907.

PWA THIN  
*v.*  
BA WIN.

*Criminal  
Revision  
No. 683A of  
1907.  
December  
7th,  
1907.*

*Criminal  
Appeal  
No. 660 of  
1907.  
December  
13th,  
1907.*

(1) 1 U.B.R. (1897—1901), 104.

1907.

NGA PAING  
alias  
KYA BYU  
v.  
KING-  
EMPEROR.

dropped the rice as soon as he was seized, and he then stabbed Sipaw with a clasp-knife.

Theft is robbery if, in attempting to carry away the property obtained by the theft, the offender, for that end, voluntarily causes hurt (section 390, Penal Code). "For that end" obviously means "for the purpose of carrying away the property." The question is, therefore, what was appellant's intent in stabbing Sipaw? The only inference I can draw from appellant's conduct is that he stabbed Sipaw in order to effect his own escape. No doubt he came prepared to cause hurt and to commit robbery if necessary, but as he dropped the rice before he caused hurt I cannot infer that he caused the hurt for the purpose of carrying away the rice.

I alter the conviction to one of theft, having made preparation for causing hurt, under section 382, and voluntarily causing hurt with a knife under section 324, Penal Code. The appellant had been previously convicted of house-breaking by night in 1901, and of theft in 1905. The sentence is altered to six years' rigorous imprisonment for the theft, and two years' rigorous imprisonment for hurt.

Criminal  
Revision  
No. 711A of  
1907.

December  
18th,  
1907.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. PO THAW.

*Security Proceedings—Preventive sections—Bad livelihood—Demand of security from person undergoing imprisonment—Criminal Procedure Code, 1898, s. 110.*

Proceedings under section 110, Code of Criminal Procedure were instituted against a person who was at the time undergoing imprisonment for an offence, and security for good behaviour was demanded from him.

*Held*,—that under the circumstances the Magistrate had no jurisdiction to commence the proceedings. The order for security was set aside.

*Queen-Empress v. Chi Do Bon*, P.J., L.B., 204, followed.

On the 23rd February 1907 Nga Po Thaw was convicted on two charges of voluntarily causing hurt, and was sentenced to four years' rigorous imprisonment, which was reduced on appeal to one year.

On 11th June the present proceedings were instituted under section 110 of the Code of Criminal Procedure, and on the 9th August 1907 the Magistrate ordered Po Thaw to execute a bond for Rs. 500, with two sureties, for his good behaviour for one year from the date of expiry of the sentence he was undergoing, and in default to be detained in rigorous imprisonment for that period.

The amount of security demanded was, in my opinion, excessive. Rs. 100 would have been ample; but that is a minor point. The words of section 110, "any person within the local limits his jurisdiction," are obviously not intended to apply to persons undergoing imprisonment, whether the jail happens to be within the local limits of the Magistrate's jurisdiction or not. The case of *Queen-Empress v. Chi Do Bon* (1) is a sufficient guide to Magistrates. In my opinion the Magistrate had no jurisdiction to commence the proceedings.

I set aside the Magistrate's order, and direct that the accused be released, so far as this case is concerned.

(1) P.J., L.B., 204.

*Before Mr. Justice Hartnoll.*

**TUN AUNG v. KING-EMPEROR.**

*Kyaw Din.*—for applicant.

*Criminal  
Revision  
No. 332B of  
1907.*

*December  
20th, 1907.*

*Mischief—Wrongful loss—Closing of watercourse—Diminution of supply of water for agricultural purposes—Use of water—Indian Penal Code, ss. 23, 430.*

A closed a watercourse without obtaining any permission to do so, and thereby diminished the supply of water received by certain fields belonging to B lower down the watercourse. He was convicted of mischief under section 430 of the Indian Penal Code.

*Held.*—that as there was nothing on the record to show that B had any legal right to the water intercepted by A, it was not proved that B's loss was wrongful, and the offence of mischief was therefore not established.

Maung Tun Aung has been convicted under section 430 of the Indian Penal Code and fined Rs. 50, or in default of payment to undergo three months' rigorous imprisonment, by the First Class Magistrate of Tapun, and he applies on revision to have the conviction set aside. The facts as set out in the judgment are undisputed, and are that he closed a watercourse without obtaining any permission to do so, thereby preventing water from finding its way to certain fields below the place where he closed it. Section 430 of the Code lays down that whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes shall be punished according to law. Here Maung Tun Aung knew that he was likely to cause a diminution of water for agricultural purposes by his action; but the point for consideration is whether he committed mischief. Mischief is defined in section 425 of the Code, and from that definition to convict a person of committing mischief it must be proved that there was on his part an intent to cause, or knowledge that he was likely to cause, wrongful loss or damage to the public or to any person. Wrongful loss is defined in section 23 of the Code which lays down that it is the loss by unlawful means of property, to which the person losing it is legally entitled. Was wrongful loss caused in the present case to the complainant Maung Po Sein? Though the point was not brought out in the evidence or in the judgment, Maung Tun Aung may possibly have caused loss by unlawful means in that he closed a watercourse, which might have been shown to be a fishery within the definition of fishery as defined in the Burma Fisheries Act (Burma Act III of 1905), without permission, and so committed an offence punishable under section 21 (c) of that Act; but I fail to see from the proceedings how Maung Po Sein was legally entitled to the water flowing down that watercourse. As far as the proceedings go, there is nothing to show that he had any legal right to the water in the course, and, if he had bunded the stream and taken the water, the point would have arisen whether he in same manner as the accused would not have been liable to be prosecuted under the Fisheries Act. Maung Po Sein's legal right to the water intercepted by Maung Tun Aung not being proved, one of the elements of wrongful loss as defined in the Indian Penal Code is non-existent. The conviction therefore cannot in my opinion stand.

It is accordingly set aside and Maung Tun Aung is acquitted, as far as this case is concerned. The fine will be refunded to him.

*Criminal  
Revision  
No. 737A of  
1907.*

*December  
21st, 1907.*

*Before Mr. Justice Irwin, C.S.I.*

**KING-EMPEROR v. ABDUL LAL SHEIN.**

*Reference to superior Magistrate—Power of Magistrate under section 380, Criminal Procedure Code—Disposal of case—Criminal Procedure Code, 1898, ss. 380, 562.*

A Second Class Magistrate found the accused guilty of an offence under section 325, Indian Penal Code, and submitted the proceedings to the District Magistrate under the proviso to section 562, Code of Criminal Procedure. The District Magistrate returned the case to the second class Magistrate, pointing out that section 562 could not be applied.

*Held*,—that the District Magistrate's action was illegal, in view of the terms of section 380, Code of Criminal Procedure.

*Queen-Empress v. Nga Khan*, 1 L.B.R., 124, referred to.

The Second Class Magistrate found the accused guilty of voluntarily causing grievous hurt, an offence under section 325, Penal Code, and he sent the record and the accused to the District Magistrate under the proviso to section 562 of the Code of Criminal Procedure.

The District Magistrate sent the case back to the Second Class Magistrate, pointing out that the provision of section 562 cannot be applied, as the offence is punishable with more than two years' imprisonment.

The proviso to section 562 enacts that the Magistrate to whom the case is submitted shall dispose of the case in manner provided by section 380. Section 380 enacts that "Such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him." If he had heard the case himself he certainly could not have sent it to the Second Class Magistrate for the purpose of passing sentence. Therefore his action in returning the case to the Second Class Magistrate was illegal. The terms of section 380 are even clearer than those of section 349, which were construed in the same sense in the case of *Queen-Empress v. Nga Khan* (1).

In the present case the accused was fined Rs. 50 and the fine was paid. Further action is not necessary.

*Criminal  
Revision  
No. 391B of  
1907.*

*December  
24th, 1907.*

*Before Mr. Justice Irwin, C.S.I.*

**KING-EMPEROR v. LU PE AND THEIN THI.**

*Refusal or neglect to comply with requisition of headman—Order of headman—Failure to pay revenue demanded—Criminal offence—Lower Burma Village Act, 1889, s. 9 (2)—Burma Land and Revenue Act, 1876.*

The accused were ordered by the headman of their village, on the request of the circle thugyi, to pay their capitation-tax at a certain place. This they failed to do, and they were consequently convicted, under section 9 (2) of the Lower Burma Village Act, of having neglected to comply with the headman's requisition.

*Held*,—that the provisions of this section do not apply to the failure of a villager to pay revenue demanded from him, the coercive procedure for enforcing payment prescribed in the Land and Revenue Act.

(1) 1 L.B.R., 124.

The Sessions Judge has referred this case for orders. His order of reference runs as follows :—

Nga Lu Pe and Nga Tein Thi have been convicted on their own plea under section 9 (2) of the Lower Burma Village Act, and sentenced to rigorous imprisonment for one month. The case came to my notice on a visit to the Prome Jail only a day or two before the expiration of the sentences.

The prosecution was instituted on a complaint by the Talokhmaw circle thugyi, who stated that in spite of repeated notices to come and pay their capitation-tax the accused had failed to do so.

A minor point in the case is that there is an obvious misjoinder of charges.

The more important point is that, in my opinion, it is a gross perversion of section 9 of the Village Act to apply it to a case of this kind. The non-payment of revenue is a matter that can be dealt with under the Land and Revenue Act and is not a criminal offence.

I agree with the learned Sessions Judge. No doubt one of the duties of a headman is to assist the circle thugyi in collecting revenue, and under section 9 every person residing in the village is bound to assist the headman in that duty on the requisition of the headman, and is punishable if he neglects or refuses to comply with such requisition; but it is absurd to say that the assistance contemplated by this section includes the acts of the persons assessed to revenue in bringing the revenue payable to a place named by the thugyi and paying it to him there. The Land and Revenue Act prescribed the manner in which the payment of revenue is to be enforced, and the nature of the coercive processes to be employed to compel payment. The officers who are to enforce payment are revenue officers. It is as much contrary to common sense as to accepted principles of construction to strain the terms of an enactment which has nothing to do directly with the collection of revenue, so as to make the Magistrates agents for the employment of another kind of coercion for the same end, and to create a criminal offence which, if it were to be created at all, would be naturally created by the Act which deals with the assessment and collection of revenue.

I am surprised to see that the District Magistrate, when the case came before him while the prisoners were still in jail, returned the record with the remark that no cause arose for interference.

I set aside the convictions and sentences passed on Nga Lu Pe and Nga Tein Thi, and acquit them.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. THE MYA.

*Fine—Release on security—Suspension of sentence of imprisonment in default of payment of fine—Distress warrant—Criminal Procedure Code, 1898, s. 388 (1).*

A sentence of imprisonment in default of payment of a fine cannot be suspended unless a distress-warrant for the levy of the fine is issued at the same time.

The accused was sentenced to fine, and in default of payment to three months' rigorous imprisonment. The Magistrate allowed her ten days to pay the fine, and released her on her giving security for her appearance. This procedure is not lawful unless the Magistrate at the same time issues the distress-warrant for the levy of the fine—section 388 (1) of the Code of Criminal Procedure.

1907.

KING-  
EMPEROR  
-v.  
LU PE.

*Criminal  
Revision  
No. 765A of  
1907.*

*December  
26th, 1907.*



Criminal  
Revision  
No. 779A of  
1907.

December  
26th, 1907.

*Before Mr. Justice Irwin, C.S.I.*

KING-EMPEROR v. THA HMUN.

*Date of commencement of sentence of imprisonment—Antedating sentence—  
Nominal sentence—Detention under trial—Custody.*

An accused person was convicted after having been in custody for a week, and was sentenced "to undergo the imprisonment he had already suffered."  
*Held,—that the sentence was illegal.*

The accused, after he had been in custody for a week, was convicted of a petty theft of plantains. He was sentenced "to undergo the imprisonment he has already suffered." The form of the sentence is bad. There is nothing in the Code of Criminal Procedure which authorizes a Magistrate to antedate the commencement of a sentence. As the Magistrate thought that the accused had been sufficiently punished by his detention while under trial, the proper course would have been to sentence him to one day's imprisonment. He would then be released on the same day on which he was sentenced.

*Before Mr. Justice Fox.*

KYA NYUN *v.* THE RANGOON MUNICIPALITY.

*Agabeg*—for applicant | *Connell*—for respondent.

*Decision of Boundary Officer as a bar to subsequent claim—Validity of proceedings—Encroachment—Adverse possession—Appeal against Boundary Officer's decision—Burma Boundaries Act, 1880, ss. 12, 17, 18—Burma Municipal Act, 1898, s. 94 (2).*

*Criminal  
Revision  
No. 300 of  
1902.*

*April 2nd,  
1902.*

A was prosecuted by the Rangoon Municipality for disobedience of a notice requiring him to remove a wall which, according to the decision of a Boundary Officer passed five years previously under section 12 of the Burma Boundaries Act, encroached upon a drainage space. No appeal had been filed against the Boundary Officer's decision.

In his defence A claimed that a right of the land on which the wall stood had been acquired by adverse possession, and also questioned the validity of the Boundary Officer's proceedings.

*Held*,—that objections to the proceedings of the Boundary Officer, which might have been made in appeal against his decision, could not now be raised; that the claim regarding adverse possession should have been put forward in the proceedings under the Boundaries Act, and that the Boundary Officer's decision was conclusive under section 17, subject only to the right of appeal under section 18 of the Burma Boundaries Act.

The petitioner is the successor in title and the owner of a piece of land which, as originally granted by Government, measured 50 feet by 25 feet.

Many years ago one of his predecessors in title built a house on the land, and one of the walls of it encroached upon the adjoining drainage space belonging to either Government or the Municipal Committee. In 1896-97 proceedings were taken under the Burma Boundaries Act to demarcate and settle the boundaries of lands in the neighbourhood.

The result of those proceedings in regard to the particular piece of land now in question was that the Boundary Officer confirmed the Demarcation Officer's marks which showed the proper limit of the petitioners's land, and declared the extension of the house on it beyond that limit to be an encroachment.

Under section 17 of the Act this decision of the Boundary Officer was conclusive subject to the appeal allowed against his order. No appeal was in this case made.

No action was at once taken by the Municipal Committee to have the encroaching wall removed, but later on notice to remove it was given on the ground that it was in a dangerous condition. It was removed, and the petitioner sent in a plan for a new wall and alteration to his house. This was sanctioned.

He began building the new wall on the site of the old one, and it had been raised some feet when the Committee had a notice served on him calling upon him under section 94 (2) of the Municipal Act to remove so much of the wall as encroached upon the drainage space.

His answer was that there was no encroachment. That, however, is met by the decision of the Boundary Officer, whose proceedings appear to have been regular.

It is argued that the decision is not binding upon the petitioner because the special notice under section 11 of the Act was not served

1902.  
KYA NYUN  
v.  
THE  
RANGOON  
MUNICI-  
PALITY.

personally upon the petitioner's predecessor. That, however, is an objection which might have been and should have been taken in appeal in the proceedings under the Boundaries Act, and cannot be taken now.

It is also argued that the petitioner and his predecessors in title had obtained a right to the land on which the old wall stood by adverse possession : that may be so, but that right should have been but was not put forward in the proceedings under the Boundaries Act.

This Act is a special local Act the object of which is by the procedure provided therein to determine all questions of boundaries of land, and the decisions of Indian Courts in provinces in which no such Act is in force have no bearing upon what is the result of a Boundary Officer's decision in this province. The act makes his decision conclusive subject to the appeals provided for under the Act.

In the present case the decision must be treated as conclusive, and although the petitioner's predecessors may have obtained a right to the extra piece of land by adverse possession, they lost that right as a consequence of the Boundary Officer's decision.

The old wall, extending as it did beyond the mark fixed by the Demarcation Officer as the proper boundary of the lot, which mark was confirmed as such by the Boundary Officer, constituted an encroachment, and under section 94 (2) of the Municipal Act, the Committee was empowered to issue a notice requiring the removal of it.

It has been argued that the petitioner was, under the section, entitled to compensation.

This was not claimed before the Magistrate, and was not a matter for him to decide.

There are no sufficient grounds for interference ; the application is dismissed.

### Privy Council.

(On appeal from the Chief Court of the Lower Burma.)

*Before Lord Robertson, Lord Collins, and Sir Arthur Wilson.*

EBRAHIM GOOLAM ARIFF—(PLAINTIFF) APPELLANT

v.

SAIBOO AND OTHERS—(DEFENDANTS) RESPONDENTS.

*Mahomedan Law—"Death-illness"—Gift made under sense of imminence of death—Validity of gift of undivided shares in freehold property and shares in companies—Mushua—Privy Council—Practice—Concurrent findings of fact—Discussion of evidence.*

A, a Mahomedan resident of Rangoon, who died on the 16th May 1902, had executed certain deeds of gift on the 2nd April 1902, by which he conveyed to certain of his minor children and wives a certain number of undivided 2,000th shares in certain properties, which comprised shares in companies and freehold property in Rangoon. It was contended that these deeds were invalid on two main grounds, firstly because they had been executed during a "death illness" under pressure of the sense of the imminence of death, and secondly because such gifts were forbidden by the law of *mushua*.

On the first contention there were concurrent findings of the Original and the First Appellate Courts to the effect that although A was ill at the time of the execution of the deeds, death was not then imminent.

*Held*,—that it would be inappropriate that the Privy Council, in reviewing concurrent judgments on a pure question of fact such as this, should be discuss the evidence in detail; and that the findings of the lower Court were justified.

The doctrine of *mushua*, on which the second contention was based, prohibits gifts of undivided shares of what is divisible.

*Held*,—that, assuming the doctrine to apply to the succession of Mahomedans resident in Rangoon, it ought not to be applied to shares in companies and to freehold property in a great commercial town, in view of the very different subjects of property to which it applied in its origin.

*Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan*, (1889) 16 I.A., 205, followed.

*Mussumat Labbi Bee Bee v. Mussumat Bibhun Bee Bee*, 6 M.W.P.H.C., 159; *Hassarat Bibi v. Golam Jaffar*, (1898) 3 C.W.N., 57; *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum and Mussumat Nawab Begum, Afzul Muhul and others*, (1867) 11 Moore, I.A., 517; *Ameeroonissa Khatoon v. Abedoonissa Khatoon*, (1874) L.R. 2 I.A., 87; *Mullick Abdool Guffoor v. Muleka*, (1884) I.L.R. 10 Cal., 1112; *Mahomed Buksh Khan v. Hosseini Bibi*, (1888) I.L.R., 15 Cal., 684, page 701; *Baker Alli Khan v. Anjuman Ana Begam*, (1903) 7 C.W.N., 465; *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry*, (1894) 22 I.A., 76, page 86; *Ranee Khujooroonissa v. Mussamut Roushun Jehan*, (1876) L.R. 3 I.A., 291; *Fatima Bibee v. Ahmad Baksh*, (1903) I.L.R. 31 Cal., 319; *Ebrahimhai v. Fulbai*, (1902) I.L.R. 26 Bom., 577; referred to.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side. The following judgment of the Chief Court (Sir Herbert Thirkell White, Chief Judge, and Mr. Justice Bigge) was delivered on the 30th May 1904 by—

*Bigge, J.*—The suits out of which these appeals have arisen were brought by the appellant, as an executor of the will of Goolam Ariff, deceased, against his minor children and two widows, to set aside certain deeds of gift each dated the 2nd day of April 1902, whereby the said Goolam Ariff purported to make over certain shares in a portion of his property to the defendants which will be hereafter more specifically described, and a deed dated the 3rd of May 1902 whereby the said Goolam Ariff and the defendants in Civil Regular No. 146 of 1902 made over the property covered to them by such deeds of gift and such shares in it as still remained in Goolam Ariff to the Goolam Ariff Estate Company, Limited, a Company which had been incorporated under the Indian Companies Act, 1882, on the 12th of April 1902.

Civil 1st  
Appeal  
Nos. 53 and  
54 of 1903.  
May 30th,  
1904.

The plaint in Civil Regular No. 142 of 1902 prayed—

1. That the instruments dated the 2nd day of April 1902 and the 3rd day of May 1902 might be declared void and ordered to be given up and cancelled;
2. That the properties, particulars whereof are set out in the schedule, might be declared to form part of the estate of Goolam Ariff, deceased (the properties, that is, included in the instruments sought to be set aside);
3. That an account might be taken;
4. That a Receiver might be appointed.

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EBRAHIM  
GOOLAM  
ARIFF  
v.  
SAIBOO.

The following issues were settled :—

1. Did Goolam Ariff subsequent to the execution of the seven instruments dated the 2nd of April 1902 and the 3rd of May 1902 remain in possession of all the properties and shares purported to be conveyed by him as his own, and receive the rents, dividends and profits, or did he so divest himself of such property as to render the gifts valid according to Muhammadan law ?

2. Are such instruments void as being mere contrivances to evade the Muhammadan Law that a Muhammadan may not make a will in favour of his heirs, and as made *benami* not to take effect during the lifetime of Goolam Ariff but only after his death ?

3. Are the gifts void as coming within the rule as to death-bed gifts ?

4. Is the deed of the 3rd of May 1902 void was made without consideration ?

5. Is it ineffective as not having been filed under the provisions of section 28 of the Indian Companies Act ?

6. Is it invalid as far as the shares of the minors are concerned because the leave of the Court to the transfer of their interests was not obtained ?

7. If so, can the plaintiff raise this objection ?

8. If the deed of the 3rd May 1902 is invalid, does it follow that those of 2nd of April 1902 are also invalid ?

9. Have there been valid transfers of the shares purported to be conveyed by the deeds of the 2nd April 1902 under the Articles of Association of the respective Companies ?

10. Are the gifts valid as being *mushua* ?

In Civil Regular No. 170 of 1902 the relief asked for is substantially the same. I have set out the relief asked for and the issues to point out and emphasize that it was never contended in the lower Court that the constitution and formation of the Goolam Ariff Estate Company, Limited, was illegal and ineffectual whether because the subscription of the Memorandum of Association was defective or for other reasons, and that consequently the judgment of the learned Judge was silent on the point simply because it was not before him.

The learned Judge found against the plaintiff in all points and dismissed the suit with costs.

The grounds of appeal, which are twelve in number and very exhaustive, do not impeach the constitution of the Limited Company.

It is not necessary to set out the facts in the case, which are very lucidly set out in the judgment of the learned Judge of the Court of first instance.

The points for our consideration are—

- (1) Whether the deeds of gift are void as having been made by Goolam Ariff during his death-illness ;
- (2) Whether they are void as colourable devices to evade the Muhammadan law ;
- (3) Whether they are void as there was insufficient delivery ;

(4) Whether they are void as being contrary to the doctrine of *mushua* ;

(5) Whether they are void as made without consideration.

With regard to what seems to have been suggested rather than contended for at the trial, that the Muhammadan law does not apply, I adopt what Chitty, J., has said, and after to the best of my ability establishing what that law is as interpreted by the highest tribunals will decide by the light of it whether the gifts impeached are valid or otherwise.

With regard to the many witnesses called to speak to the state of Goolam Ariff's health during the last few months of his life, the learned Judge has made some remarks which do not seem to have commended themselves to the leading counsel for the appellant, who has lost sight of the fact that the learned Judge's comments hit the other side as well as his own. After referring to the statements of some of them he said :—

Now I am bound to say that I do not place much reliance on this class of evidence. It is extremely easy to state that Goolam Ariff said this or that. It is very difficult to disprove it or even to test the accuracy of such statements. Many of the witnesses on either side are, as would be expected in a case like this, far from impartial. Thus bias has only too often been apparent. Of course there are impartial witnesses on either side.

So far from dissenting from this I think it extremely sound, and as the learned Judge had the advantage of seeing and hearing the witnesses I shall adopt without further question the view he has taken of the value of this testimony. He said he was disposed to place more reliance on the medical testimony taken as a whole and the actual doings and movements of Goolam Ariff which were beyond dispute, which was surely an eminently judicious position to assume. As intimated at the hearing we shall decide the question of Goolam Ariff's physical condition at the time he made the instruments now impeached by reference to the very voluminous medical evidence in the case.

The question of his mental capacity or otherwise is not in issue. It is said at page 332 of the 2nd edition of Wilson's Digest of Anglo-Muhammadan Law, section 284, that "a gift made in mortal sickness is so far regarded as a bequest that it cannot operate on more than a third of the testator's net assets unless with the consent of all the heirs, nor in favour of one heir without the consent of all the others," and "a gift is said to have been made in mortal sickness only if it was at the time highly probable that the malady would soon end fatally and it did not in fact so end."

In *Mussumat Labbi Bee Bee v. Mussumat Bibhun Bee Bee* (1), it was held that the term *Marz-ul-Mout* is applicable not only to diseases which actually cause death, but to diseases from which it is probable death will ensue, so as to engender in the person afflicted with the disease an apprehension of death ; and that a person labouring under such a disease cannot make a valid gift of the whole of his property until a year has elapsed from the time he was first attacked

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by it ; and that when a gift is made by a person labouring under such disease, it is good to the extent of one-third of the subject of the gift if the donee has been put in possession by the donor. At page 163 of the report the learned Judges said :—

The Muhammadan law declares persons labouring under a death sickness to be incapable of certain acts. They cannot make a valid gift nor dispose of their property in charity. If, however, possession has been given of the subject of the gift it is valid to the extent of one-third of the sick person's estate. The object of this law is obvious, but it is also apparent that if it be unrestricted in its operation it would deprive persons who are suffering from lingering diseases, but who at the same time are in full possession of their senses and free from the influences which sometimes affect those who are labouring under mortal sickness, of all power of dealing with their property. The law therefore provides that when the malady is of long continuance and there is no immediate apprehension of death, a sick person may make a gift of the whole of his property.

*Marz-ul-Mout* is discussed at pages 51—59 of the 2nd edition of Ameer Ali's Muhammadan Law, and at page 56 the learned author says :—

Under the Hanafi law, the term *Marz-ul-Mout* is applicable not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue, so as to engender in the person affected with the disease an apprehension of death.

So I would put it that the term applies to a gift made under the pressure of the sense of the imminence of death. The learned author then proceeds :—

But it has been held by the Allahabad High Court that where this malady is of long continuance, and there is no immediate apprehension of death, a sick person may make a gift of his entire property. A malady of long continuance is an illness which has lasted for a year, and there is no immediate apprehension of death.

It is not necessary to multiply authorities, and I shall only refer to *Hassarat Bi Bi v. Goolam Jaffar* (2), which is largely quoted in the judgment of Chitty, J.

Dr. Pearse saw Goolam Ariff for the first time on the 24th of March 1902; that is to say, rather less than two months before his death, which occurred on the 16th of May 1902. He found him wasted and anæmic and showing signs of arterial degeneration (atheroma), diabetes and degeneration of the liver. From the 24th of March he attended him daily or twice a day until he died, but did not begin to look upon his case as serious until about the middle of April, though in the early days of that month when on one occasion he visited his house he thought he was improving. It was within his knowledge that he had been suffering from atheroma, diabetes and degeneration of the liver for years and he did not consider them immediately serious in themselves, and it was not until after Major Duer saw the patient with him in consultation on 31st of March that he began to entertain any fear of the case ending fatally, though even when he saw him in consultation with Colonel Frenchman and Colonel Davis on 14th May he did not apprehend that the disease would terminate fatally ; and though he was not very surprised to hear of his death on the 16th, he did not expect anything of kind as he had seen him on the morning



when he was no worse. As to Goolam Ariff's mental condition he said he was certainly weak-minded in the way that he was very emotional and changeable in his moods. Sometimes he would be in very low spirits, sometimes in very high spirits without any apparent reason, and would change from one to the other rapidly, and that he appeared (like most invalids) to be very anxious about the issue of his illness. The witness also said that he was perfectly able to manage his affairs throughout, and the sum of his evidence is that Goolam Ariff, an old man, who had lived hard, was suffering from a complication of disorders from which he had no desire to die if he could be saved by medical skill. But there is no hint or suggestion that his condition was putting him in apprehension of death within the meaning of the expression *Marz-ul-Mout*.

Major Duer saw Goolam Ariff in consultation with Dr. Pearse on the 31st of March and on the 3rd and 4th of April 1902. He had not known him by sight before and thought he was suffering from cirrhosis of the liver and atheroma, but did not think that he was in any immediate danger, but thought that if he took care of himself he might go on for some time, that is, a year or two or perhaps longer, though complete restoration to health was impossible. The witness considered the case serious in that the patient might die from apoplexy or from hæmorrhage of the stomach if he was suffering from cirrhosis of the liver or from the rupture of an unsuspected aneurism if he was suffering from atheroma. He said that the symptoms were such as to make a man think seriously of his condition, but that apart from the bursting of the blood vessel which caused death, he should think that with the other symptoms he might have gone on for four or five years, though he was always in danger. So that while he was suffering from symptoms which were undoubtedly serious, he might have gone on for years as it is within the experience of all of us many persons have done while suffering from incurable and dangerous maladies, and no case of *Marz-ul-Mout* can be established on the very careful evidence of Major Duer.

Colonel Frenchman saw Goolam Ariff in consultation with Colonel Davis and Dr. Pearse on the 10th and 14th May. On the first occasion he found him sitting on a sofa and talked to him in Gujarati and found that he talked like any ordinary man and was not despondent though anxious to know if he was going to get well. The result of the examination was that they thought that he was suffering from cirrhosis of the liver in an early stage which the witness said would have killed him if it went on long enough and if he did not take care and was not properly treated, but he did not consider he was in imminent danger and told him so and was surprised when he heard of his death. This witness was of opinion that emphysema of the lungs due to old age was present but no marked signs of atheroma, and thought that the leg pains were due to neurosis and that at neither of the consultations did any of the three notice that he had atheroma, and that if he had had all the symptoms he spoke of and also diabetes he would have considered it a serious case but not imminently fatal.

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Colonel Davis had known Goolam Ariff and had seen him professionally about a year before he was called on to see him in consultation with Colonel Frenchman. At the first consultation he found him decidedly anæmic and considerably thinner, and he complained of pains in the limbs and tendons, shortness of breath and dyspepsia. He was perfectly clear-headed and garrulous and did not seem to be very ill. The witness found his liver slightly contracted, but examination of his urine showed entire absence of sugar or albumen, from which he concluded that diabetes, which he knew he had suffered from, had ceased. There was some emphysema of the lungs. On the 14th there was no change. Colonel Davis considered that his condition was serious to a certain extent, that is to say, that unless he kept to a certain line of treatment and was very careful, he ran great risks, but that there was not any immediate danger of death. He also said he did not see any symptom which should make Goolam Ariff himself apprehensive of death though he expressed great anxiety as to his condition but did not appear to have given up hopes of recovery. The witness also said that with proper care and treatment he saw no reason why he should not have lived for years and that he was surprised to hear of his death two days after he had seen him at the second consultation.

As with the evidence of the other doctors Marz-ul-Mout is not in any way established by the evidence of Colonel Frenchman and Colonel Davis, and I think that the learned Judge after an exhaustive review of the medical and other evidence came to a very sound and satisfactory conclusion on the point.

I now pass to the consideration of whether the gifts are void as there was no delivery and as being contrary to the doctrine of *mushua*. Speaking of what may or what may not form the subject of gift and quoting from the *Fatawa-i-Alamgiri*, Amir Ali at page 67 of his work says that the thing itself must be in existence at the time of the gift, the subject of the gift must have legal value, and possession must be taken of it to establish in it the right of the donee, and if it is in its nature divisible it must be divided and distinguished from and not joined to or occupied with anything else that is not given. Again at page 68 the learned author says that according to the *Fatawa-i-Alamgiri* "the gift of a thing which is separated from and emptied of the property and rights of the donor is lawful; so also of a *mushua* or undivided part of a thing that does not admit of partition, or is of such a nature that some kind of benefit or advantage that can be derived from it while whole or undivided cannot be derived from it after partition, as for instance a small house or a small bath. But the gift of a *mushua* is a thing that admits of partition consistently with the preservation of all the uses which might be made of it before partition is not valid. What is required is that the thing given be partitioned and separated at the time of taking possession, not at the time on gift." The learned author has dealt with the subject at considerable length to show, as he says at page 73, the condition of society in which the rules were promulgated and what were the subjects to

which they were in the main applicable. He also goes on to say that the principles have been construed by the later lawyers most liberally, and that he should attempt to prove that the spirit of the Muhammadan law, even where it has been subjected to patristic influences, is in accord with the requirements of progress; and again at page 75 he says: "From the examples given in Arabian law works it can easily be inferred that the doctrine of *mushua* was applicable only to small plots of land and houses; it does not seem to have been contemplated by the Arabian jurists that the doctrine should be applicable to specific shares in large estates or *zemindaris*"; and after glancing at the economical condition of society about the beginning of the Hanafi law and the time when the early jurists of that school flourished, he concludes: "The wealth of the people was chiefly derived from common trade, immense flocks of sheep and goats, large groves and plantations. Apparently therefore the doctrine of *musuha* was not intended to apply to large landed estates such as came into existence in later times."

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In *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum and Mussumat Nawab Begum, Afzul Muhul and others* (3), it was held by their Lordships of the Privy Council that though the transfer of a legal title will satisfy the provision of the Muhammadan law which relates to the point of seisin in its legal and technical sense, yet that alone will not suffice when no intention exists to transfer the beneficial ownership either present or future; but when there is a real transfer under the Muhammadan law reserving not the dominion over the corpus nor any share of dominion over the corpus but simply stipulating for and obtaining a right to the recurring produce during his lifetime, there will be a complete gift by Muhammadan law. In that case the subject of the gift was Government Promissory Notes, the interest of which was reserved by the donor, and their Lordships go on to say:—

Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Muhammadan law defeats not the grant but the condition.

In *Ameeroonissa Khatoon v. Abedoonissa Khatoon* (4), their Lordships of the Privy Council discussed the question whether the objection of invalidity to a gift on the ground of *mushua* was applicable to shares in a *zemindari* which themselves paid revenue separately. The High Court after stating that the shares were for revenue purposes distinct estates, each having a separate number in the Collector's books and each being liable to Government only for its own separately assessed revenue, and further that the proprietor collected a definite share of the rents from the ryots and had a right to this definite share and no more, held that the rule of the Muhammadan law did not apply to property of this description. Their Lordships said:—

In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to properties of the peculiar description of these definite shares in *zemindaris* which are in their nature separate estates with separate and defined

(3) (1867) 11 Moore, I.A., 517.

(4) (1874) L.R. 2 I.A., 1287.

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rents. It was insisted by Mr. Leith that the land itself being undivided and the owners of the shares entitled to require partition of it, the property remained *mushua*. But although this right may exist, the shares in zemindaris appear to their Lordships to be, from the special legislation relating to them, in themselves and before any partition of the land definite estates capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to *mushua*.

No doubt the circumstances of this case were very special, but I think none the less, that the decision indicates a tendency to soften the rigidity of the rule and, in the words of Mr. Amir Ali, to bring it in accord with the requirements of progress. In this connection the remarks of Garth, C.J., in *Mullicky Atdool Gaffoor v. Muleka* (5), are very pertinent.

The arguments on the part of the plaintiff resolve themselves into three main points:—

1. That by Muhammadan law a gift cannot be made of lands which are not in the possession of the donor nor of incorporeal properties such as rents, *malikana* rights and the like.
2. That an undivided share of a house or zemindari cannot be made the subject of a gift.
3. That a gift to two persons without previous division and separation is invalid.

In dealing with these points we must not forget that the Muhammadan law to which our attention has been directed in works of very ancient authority was promulgated many centuries ago in Bagdad and other Muhammadan countries under a very different state of laws and society from that which now prevails in India, and that although we do our best here in suits between Muhammadans to follow the rules of Muhammadan law it is often difficult to discover what these rules really were and still more difficult to reconcile the differences which so constantly arose between the great expounders of the Muhammadan law ordinarily current in India, namely, Abu Hanifa and his two disciples. We must endeavour, so far as we can, to ascertain the true principles upon which that law was founded and to administer it with a due regard to the rules of equity and good conscience as well as to the laws and the state of society and circumstances which now prevail in this country.

In *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan* (6), the subject of the gift was shares in revenue-paying villages with land, houses and moveables. Of the greater portion of this property the donor, a mother giving them to her daughter, had only so far possession that she was in receipt of the rents and profits. In the deed of gift she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she made the donee, her daughter, possessor of all the properties, and she directed that the gift should be carried into effect by the daughter's husband, who was manager of estates on behalf of both mother and daughter before them. It was held that sufficient possession had been taken on behalf of the daughter to render the gift effectual.

(5) (1884) I.L.R. 10 Cal., 1112.

(6) (1889) 16 I.A., 295.

In the course of their judgment their Lordships said that it was unnecessary to express an opinion whether the gift was invalid or not, for it appeared that even if invalid, possession given and taken under it transferred the property, and their judgment contains these weighty words :—

The authorities relating to gifts of *mushua* have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore lectures of 1884. Their Lordships do not refer to these lectures as an authority, but the authorities referred to show that possession taken under an invalid gift of *mushua* transfers the property according to the doctrines of both the Shia and Sunni schools, see pages 79 and 85. The doctrine relating to the invalidity of gifts of *mushua* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest bounds.

The circumstances of this case are likewise special, but this judgment is a good specimen of the ameliorative tendency of judicial decisions and lays down a broad and liberal spirit for the interpretation of this black-letter law. The law of *mushua* was again referred to by their Lordships in *Mahomed Buksh Khan v. Hosseini Bibi* (7). In *Baker Ali Khan v. Anjuman Ara Begam* (8), their Lordships referred to the judgment in *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (9), in which the danger was pointed out of relying upon ancient texts of Muhammadan law and even precepts of the Prophet, of taking them literally and deducing from them new rules of law, especially when such proposed rules do not conduce to substantial justice, and said :—

That danger is equally great whether reliance is placed upon fresh texts newly brought to light or upon fresh logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law and to be introduced because they seem to lawyers of the present day to follow logically from ancient texts, however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.

These being the main authorities, the next step is to consider what Goolam Ariff did in order to effectuate the gifts that have been impeached. Mr. Cowasjee, by whom all the documents which are the subject of the suits were prepared, has stated that early in December 1901 Goolam Ariff stated that he wished to form his property into a company as his brother Cassim Ariff had done the same in Calcutta, and that he also wanted to make gifts to his minor children and wives as he had spent a lot of money on his two elder sons, who had proved ungrateful. He asked for a list of the properties he wished to deal with, which was furnished in about a week, on which he began to prepare the necessary documents and advised his client that the best course would be to make gifts of whatever he wanted to the beneficiaries and then form a company with them taking their shares in the properties in payment of their shares in such company. Owing to Goolam Ariff's frequent changes of mind and consequent variations of instructions it was not until March 1902 that the drafts were ready, so that instead of that hurry in their preparation and in carrying out

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(7) (1888) I.L.R., 15 Cal., 684, p. 701.

(8) (1903) 7 C.W.N., 465.

(9) (1894) 22 I.A., 76, at p. 86.

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Goolam Ariff's instructions on which some stress has been laid, it appears that Mr. Cowasjee pursued that leisurely course which is so often characteristic of the conveyancing branch of the law. From the beginning he was enjoined to keep what was going on secret from the elder sons. The beneficiaries were—(1) Moosa Goolam Ariff, (2) Hoosein Goolam Ariff, (3) Salay Goolam Ariff, (4) Russool Bibi, (5) Hafiz Bibi, the minor children of Goolam Ariff, and (6) Saiboo and (7) Mariam Bibi, his wives; and by separate deeds of gifts, all dated the 2nd of April 1902, the following shares in the properties therein specified, the value of which was declared to be 20 lakhs, were transferred and assigned to such beneficiaries. The property consisted of shares in public companies and immovable property in Rangoon, and the whole was divided into 2,000 shares, out of which the following were transferred to the minors and wives :—

200/2,000 to Moosa Goolam Ariff,  
200/2,000 to Hoosein Goolam Ariff,  
200/2,000 to Salay Goolam Ariff,  
100/2,000 to Russool Bibi,  
100/2,000 to Hafiz Bibi,  
25/2,000 to Saiboo,  
25/2,000 to Mariam,

making in all 850 shares, the balance of 1,150 remaining in the donor Goolam Ariff.

On the same day Goolam Ariff assigned a quarter share in first class lot No. 3 in block C measuring 3,450 square feet, which, with the three-storied pucca building thereon, was valued at Rs. 90,000 to Moosa, a quarter share of the same property to Hoosein, and the moiety remaining to Salay, and by another deed of the same date he made over all the furniture in the house which is 47, Merchant Street, to these three minor sons.

The shares dealt with were those of the (1) Soorti Burra Bazaar Company, (2) the Poozundaung Bazaar Company, (3) the Kemmendine Surati Bazaar Company, (4) the Boglay Bazaar Company, (5) the Rangoon Iron Bazaar Company, (6) the Rangoon Botatoung Company, three of which namely, the Poozundaung Bazaar Company, the Kemmendine Surati Bazaar Company and the Boglay Bazaar Company, had their offices in Goolam Ariff's offices at 47, Merchant Street.

To effectuate his purpose, Goolam Ariff expended a very large sum for legal expenses and cost of stamps, which in itself is a very strong indication of his intention to make actual and not colourable gifts. I wish to say as little as possible about the Goolam Ariff Estate Company, Limited, for although its formation and constitution were hotly discussed before us the subject was not raised at the original trial and we cannot and should not express any opinion whatever upon it. But the steps taken by Goolam Ariff in forming it and in transferring the shares held by him in companies to it may be considered in reference to his intention to divest himself of the property he purported to make over, and in my opinion it is very strong evidence of such intention.



He had a guardian appointed to his children, namely, Hashim Cassim Patail, and by an Indenture dated the 3rd of May 1902, made between Hajee Goolam Ariff, the minors represented by their guardian the said Hashim Cassim Patail and Saiboo and Mariam Bibi, all thereafter called the transferors, of the one part; and the Goolam Ariff Estate Company, Limited, thereafter called the Company, of the other part, the property described in the schedule and being that described as of the value of 20 lakhs and divided into 2,000 shares as aforesaid was transferred to the Company. This deed recites the deeds of gift of the 2nd of April and that Hashim Cassim Patail as such guardian jointly with Goolam Ariff had taken possession of the shares, lands, tenements and hereditaments in the schedule mentioned and that the transferors had agreed to transfer their shares in the same to the Company in pursuance of the agreement contained in the Memorandum of Association. Of course this deed in itself would not validate the gifts if they were not otherwise good, but looking at it as a whole and also by reference to the recitals of the deeds of gift that possession had been taken by the guardian, it seems to me to afford evidence of the intention of Goolam Ariff and that after all is what we have to ascertain.

As regards the companies whose registered offices were in Goolam Ariff's house, while separate cash-books were kept, the actual rupees were all kept together, and when a considerable sum had accumulated it was handed over to C. T. L. Solliappa Chetty and placed to an account in the name of Goolam Ariff. In March 1902 a more business-like system was initiated, and the moneys of the Poozundaung Company and the Boglay Bazaar Company kept separate from his. Up to April the rent of each of Goolam Ariff's houses was credited to a separate account in the ledger as received from the durwan, but after the 13th of April they were not so entered, as the clerk Fulchand Bhugwangi was told by Munnee, who has played a prominent part in these complicated matters, that the houses belonged to the Goolam Ariff Estate Company and that the rents should be entered in a new book, and a new cash-book was opened for the Company in which such rents were entered after that date. Fulchand said that no rents were credited in April and May to the wives or children, and that in May they were collected in the usual way on bills signed by Goolam Ariff, but that in respect of No. 47, Merchant Street, he got Hashim Cassim Patail's signature for the rent of the tenant's portion but not for the part occupied by Goolam Ariff himself. As to that part the witness said: "Goolam Ariff did pay rent once for the portion of the house occupied by him. No money passed, but on the instructions of Ismail the amount was debited in one book and credited in another. This Rs. 120 are debited on the 9th May for rent for the portions of No. 47, Merchant Street, occupied by Goolam Ariff including the office. The Rs. 50 is for rent of No. 24, the house occupied by Ebrahim." These entries are to be found in Exhibit 11. Hashim Cassim Patail said that, on the advice of Mr. Cowasjee, he told Goolam Ariff that he would have to pay rent for the upper part

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of 47, Merchant Street, and he produced the letter on the 15th of April (Exhibit 37), written to him as guardian of the minors Moosa, Hoosein and Salay by Goolam Ariff, in which he said :—

On the 1st instant I gave you possession of my house No. 47, Merchant Street, with furniture therein, of which I have made a gift to my sons abovenamed. As arranged with you, I shall continue to occupy portions of this house and use the furniture until I can make other arrangements, and in the meantime, I shall pay you rent for the dwelling portion of the house at Rs. 80 per mensem, for the office room Rs. 20 per mensem, and for the use of the furniture Rs. 20 per mensem in all Rs. 120.

He said that as to the portion of the house not occupied by Goolam Ariff, he made out bills for the rent which he handed to Fulchand, and also the book which has been called the guardian's cash-book.

The learned Judge had dealt with the argument that no formal application for transfer was made to the directors of the various companies as provided for by their Articles of Association, and has arrived at a perfectly correct conclusion. While I am unable to agree with him that the shares in the companies were not capable of partition, for Goolam Ariff might have given each of the beneficiaries so many shares outright instead of so many 2,000 parts in them, I am in entire accord with him that the doctrine of *mushua* has no application to the gifts of shares of immoveable property. My reason for that conclusion is this, that the highest authority has decided that the doctrine is wholly unadapted to a progressive state of society and must be confined within the strictest bounds, and it would be flying in the face of that decision to apply a doctrine which in its origin applied to flocks and herds and plantation to shares in companies and landed property in one of the most progressive towns in the Empire. As to the other points it seems to me that in view of the deeds of gift, the transfer of the shares, the endorsements of the certificates, and the transfer effected by the deed of the 3rd of May 1902, and the letter, Exhibit 37, that the divesting of himself of the property by Goolam Ariff was complete, unless we are to hold that actual manual delivery of the share certificates and livery of seisin of the immoveable property were essential, a proposition so erroneous that it may be dismissed without further discussion. I would dismiss these appeals with costs.

*Thirkell White, C.J.*—The facts of these cases have been so fully set out in the judgments of the learned Judge of the Court of first instance and of my learned colleague on this bench that it is not necessary for me to restate them. The question for decision seems to me to be whether Haji Goolam Ariff, the deceased, made effectual and valid gifts of certain shares in his estate to two of his wives and five of his minor children. If it is held that the gifts were valid, it does not seem that the question whether the shares so given were afterwards legally transferred to a company or not can affect the matter in issue between the parties. The plaintiff claims these shares as part of the estate of Goolam Ariff at the time of his death. If it is held that Goolam Ariff legally divested himself of the property in these shares, and that they legally became the property of the donees, it seems obvious that the plaintiff is in the same position whether the shares

were transferred to a company or whether they remained the property of the wives and children. All the evidence concerning the formation and constitution of the company and the transfer to it of certain property may be relevant as indicative of Goolam Ariff's intention to make valid gifts, but if it is held that the gifts were effectual, the questions concerning the company and the dealings with it of Goolam Ariff and his wives and minor children are not in issue in this case.

I think there can be no doubt that the validity of the gifts must be determined by Mahomedan law. There is a mass of authority including many cases before the Privy Council to this effect; and at the hearing of this appeal the applicability of Mahomedan law to this part of the case was not seriously disputed. I understand that the learned counsel for the respondents merely urged that this law should be administered with due regard to the present state of Mahomedan society.

The validity of the gifts alleged to have been made by Goolam Ariff is impugned on the following grounds, namely—

- (1) that they were colourable devices to evade the provisions of the Mahomedan law and were not *bonâ fide* transactions;
- (2) that they were invalid because made while Goolam Ariff was suffering from mortal sickness;
- (3) that they were void as being contrary to the doctrine of *mushua*; and
- (4) that they were not completed by delivery of possession.

It is not disputed that a Mahomedan of the Sunni sect, as was Goolam Ariff, may make gifts of all or any part of his property during his lifetime, even though the effect may be to defeat the Mahomedan Law of Succession. On this point it is sufficient to cite the words of their Lordships of the Privy Council in *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum* (3) :—

It is to be observed that in the absence of immoral or illegal purposes accompanying and prompting an act of disposition of property, a disposition which the law admits cannot be evasive of the law. The law of succession *ab intestato* applies only to the assets which constitute the succession. If the law allows alienation so as to defeat a succession, the question whether a subject of property is part of the assets or not, raises simply the question whether the transfer of it is legally complete. The design to alter, and so in one sense to defeat, the disposition of property is simply a design to conform to the law whilst working out an unforbidden design.

Again in *Ranee Khujooroonissa v. Mussamut Roushun Jehan* (10)—

The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceedings of this sort to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with.

(10) (1876) L.R. 3 I.A. 291.

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It is clear on the evidence, that Goolam Ariff did take steps which he was advised were effectual to make over shares in his estate to his wives and minor children; he spent a considerable sum of money, including cost of stamps and legal expenses more than Rs. 30,000, in giving effect to this design; and he had a guardian of the property of the minor children appointed. He took what he believed were legal steps to constitute a company, and the bulk of the property given to the wives and children was invested in this company. He observed the usual formalities in order to the transfer of so much of his estate as consisted of shares in various companies to this company. It is true that he himself was to be irremovable and sole director of this company during his lifetime. But this does not show that the company was not genuine. Although he thus retained the management of his whole estate, he did not retain the proprietorship of the whole of it. The shareholders in the company, his wives and minor children, would be legally entitled to their share in the profits of the company. It seems to me, that there is no reasonable ground for the suggestion that the gifts were not made in good faith, with the intention of divesting the donor of the ownership in their subject-matter. Whether the company was legally constituted or not, it seems clear that Goolam Ariff believed and intended it to be so. If the necessary forms were complied with, and the necessary conditions fulfilled, I do not think it can be held that the gifts were merely pretended gifts, and that Goolam Ariff had no intention of divesting himself of the enjoyment, though not of the management, of a certain part of the estate.

It remains for consideration whether the necessary forms were complied with and whether the gifts were legally valid and complete. I concur in all that has been said by my learned colleague as to the value of the evidence respecting the state of Goolam Ariff's health and his state of mind at the time when these gifts purported to be made. In view of the conflict of testimony and of the nature of the evidence of friends and relations, reliance must be placed exclusively on the medical evidence on this point. There is abundance of it. The authorities on the subject of *Marz-ul-Mout* or death-illness have been cited and discussed by my learned colleague. They have also been considered in a very recent case in the Calcutta High Court, namely, that of *Fatima Bibee v. Ahmad Baksh* (11). In that case it seems to have been held that the crucial question is whether there is an apprehension of death. If that is held to be the test, I agree that when he executed the deeds of gift Goolam Ariff was not under the apprehension that this sickness would have a fatal issue. The doctors who examined and attended him did not expect that his illness would terminate fatally. Mr. Pearse had no such expectation two days before Goolam Ariff's death. Major Duer thought that he might have gone on for four or five years, though he was always in danger. These are the plaintiff's witnesses. Colonel Frenchman considered the case

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(11). (1903) I.L.R. 31 Cal., 319.

serious but not imminently fatal. Colonel Davis saw no reason why with proper care and treatment he might not live for years.

If it is held that the long continuance of the disease prevents it being regarded as a death-illness, as has been held by all the authorities, there is the opinion of Mr. Pearse that the arterial degeneration, diabetes, and degeneration of the liver were conditions which Goolam Ariff had had for years.

As a matter of fact, as has been found by the Court of first instance, it is not proved that Goolam Ariff died from any of the diseases from which he was known to be suffering. If he did not die from any of these diseases but from the bursting of a blood vessel, which had not been foreseen or expected, it does not seem possible to hold that he was in his death-illness when he executed the deeds of gift.

Whichever test may be applied, I concur in holding that the gifts were not invalid because they were made when the donor was in his death-illness. I think it is clear that they were not so made.

The next question is whether the gifts were invalid because they were contrary to the doctrine of *mushua*. On this point, also, I do not propose to repeat the examination of the authorities which has been made by my learned colleague. It is clear that the tendency of the decisions has been to restrict the application of the doctrine within the narrowest limits. There is the definite pronouncement of their Lordships of the Privy Council in *Sheikh Muhammad Muntaz Ahmad v. Zubaida Jan* (6) :—

The doctrine relating to the invalidity of gifts of *mushua* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules.

I do not think the intention of this ruling is that the doctrine should be altogether disregarded or considered as abrogated. The rule is that the gift of an undivided part in property capable of partition is invalid: and as was said in the case of *Ameeroonissa Khatoon v. Abedoonissa Khatoon* (4) a rule of this kind does exist with regard to some subjects of gift. The question seems to be whether the thing of which a part is intended to be given is capable of division. The subject-matter of the gifts in the present cases consisted of undivided parts of a large number of shares in six companies, and of 19 pieces of land and the buildings standing thereon. The wish of the donor was not to give each of the donees property of a certain value. If that had been his desire he could have given a definite number of shares to one, specific immoveable property to another, and so on. But what he desired to do was to give to each of the donees a specific share in his whole estate (or the greater part of it). There may have been a good reason for this. The value of any separate part of the estate, whether shares or immoveable property, might fluctuate. If definite shares in the whole estate were given, each of the donees would participate in the rise or fall in the value of my particular part. If the estate is regarded as a whole, it seems to me that it must be held to be not capable of division. The shares in companies, taken together, were incapable of division, and so, I think, was the immoveable property even if it be held that any individual house could be divided, which

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seems to me open to question. In my opinion, the view taken by my learned colleague is correct, and this estate is not one to which the doctrine of *mushua* can properly be applied. But even if the contrary view be held, I do not think that it will affect the decision in this case. The reason for this opinion arises out of a consideration of the rule as to delivery of possession.

Ordinarily no doubt delivery of possession is necessary to complete a gift under Mahomedan law. But there are exceptions. In the case of *Ameeroonissa Khatoon v. Abedoonissa Khatoon* (4), their Lordships of the Privy Council said :—

Where there is, on the part of a father or other guardian, a real and *bona fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

It is not necessary to seek for the reasons on which this binding ruling is based. But it may be remarked that in Macnaghten's Principles of Muhammadan Law,\* it is stated also that a gift of a house by a wife to a husband is valid, though she continues to occupy it with her husband. Similarly, it has been held in *Ebrahimbhai v. Fulbai* (12) that a gift by a husband to a wife was complete without delivery of possession. I think it may safely be held that the rule laid down in the case of gifts to minors is applicable, for the same reasons, to the case of gifts by a husband to a wife. I concur with the Court of first instance in holding that in the cases under consideration, which are cases of gifts by a man to his wives and minor children, delivery of possession was not necessary. As a matter of fact, there seems to have been no delivery in this case, except perhaps in respect of the house given to the three minor sons, the subject of suit No. 170 of 1902.

It has been ruled that transfer of possession taken under an invalid gift of *mushua* transfers the property—*Sheikh Muhammad Muntaz Ahmad v. Zubaida Jan* (6). It may be deduced from this that, in case of an invalid gift of *mushua*, where delivery of possession is not necessary, the doctrine of *mushua* is not applicable. That is the view which seems to have been held by Mahomedan lawyers. For in Baillie's Digest† it is said that when a father has given a mansion to his little son, in which there are goods belonging to himself, a gift is lawful and approved. And this is one of the cases cited as illustrations of the application of the rule as to *mushua* as between an ordinary donor and donee.‡ The reason is, no doubt, that possession of the father or guardian is held to be possession of the minor. If this rule be applied, it is therefore, as stated above, not material whether the estate of which parts were given to the respondents in this case was capable of division or not.

For these reasons, I concur with my learned colleague in thinking that the decrees of the Court of first instance should be affirmed and that these appeals should be dismissed with costs.

(12) (1902) I.L.R. 26 Bom., 577.

\* Page 232. † Hanifeca, 539, 1st Part, 2nd edition.

‡ Hanifeca, 527, 1st Part, 2nd edition.

The judgment of their Lordships of the Privy Council was delivered on the 3rd July 1907 by—

*Lord Robertson.*—The questions raised by this Appeal relate to the succession of Goolam Ariff, a wealthy Mahomedan resident of Rangoon, who died on 16th May 1902. He left a will dated 19th April 1902, by which he bequeathed his property to his heirs according to the Mahomedan law. The controversy between the parties is concerned with the validity of certain deeds of gift, dated 2nd April 1902, by which he conveyed to certain of his minor children and wives a certain number of undivided 2,000th shares in certain valuable properties. These deeds are attacked by the executor of the will on two main grounds, the first relating to the physical condition of the deceased at the date of execution, the second founded on the law of *mushua*, which is said to forbid them. (The attack on the deeds as “colourable” so entirely failed, that it is unnecessary to do more than state it was made.)

The first of these is a pure question of fact; the two Courts have concurred; and each judgment is supported by careful and elaborate reasoning. The law applicable is not in controversy; the invalidity alleged arises where the gift is made under pressure of the sense of the imminence of death.

The difficulty is in applying this to the subtle and conjectural problem of the mental condition of the testator in each case. It would be inappropriate that their Lordships, in reviewing concurrent judgments, should rediscuss the evidence in detail. Goolam Ariff was an elderly man, who had not led a careful life; he suffered, and knew that he suffered, from degeneration of the arteries and of the liver, and he had been sharply ill. His life, therefore, was an old and a bad one. It is highly probable that the execution of the disputed deeds was suggested by his realising the prudence of setting his house in order, but this is the motive of all wills and especially of the wills of the old and ailing. Having examined the evidence, their Lordships consider that the conclusion of the Courts was sound.

The other disputed question is of a very different legal quality. The property which the deceased had to dispose of consisted of freehold land in Rangoon and shares in six companies. Their Lordships assume the law of *mushua* to apply to the succession of Mahomedans who reside in Rangoon; but the serious question is whether it applies to property of the nature described. What was done by Goolam Ariff was this: he (notionally) divided the property to be dealt with into 2,000 shares; he kept to himself 1,150 shares, and the remaining 850 he distributed among the persons to be benefited, giving 200 shares apiece to three of them, 100 shares apiece to two of them, and 25 shares a piece to two of them. Now it is said that this gift was void, as being contrary to the doctrine of *mushua*. In the first place, even if the duty of the Courts were to construct a prohibition of gifts of undivided shares of what is divisible, which should be applicable to the conditions of modern life, it would seem impossible in the case of the shares, and extremely difficult in the case of freehold

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property in a town, to carry it out. But the attitude of the law towards this doctrine of *mushua* does not involve any such constructive application of the doctrine. It was laid down in the Privy Council case of *Mumtaz Ahmad v. Zubaida Jan* (6) that "The doctrine relating to the invalidity of gifts of *mushua* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules." Their Lordships concur in the conclusion arrived at below that it would be inconsistent with that decision to apply a doctrine, which in its origin applied to very different subjects of property, to shares in companies and freehold property in a great commercial town. The argument of the Appellant was not that the law of *mushua* did in fact embrace (in the sense of having been applied to) such property, but that, if the same aspect of life and things were logically applied, it involved the invalidity of the gifts in dispute. But this is not the true criterion.

Their Lordships will humbly advise His Majesty that the Appeal ought to be dismissed. The Appellant will pay the costs of the Appeal.

### Privy Council.

(On appeal from the Chief Court of Lower Burma.)

*Before Lord Davey, Lord Robertson and Sir Arthur Wilson.*

MA ME GALE v. MA SA YI.

*Buddhist Law : Adoption—Proof of keitima adoption.*

Civil  
Regular  
Appeal  
No. 5 of  
1901.

December  
8th, 1904.

Neither ceremony nor written document is required to constitute a *keitima* adoption under Buddhist Law. The consent of the natural parents and the taking of the child by the adoptive parents, with the intention that the child shall inherit, must be proved to establish such an adoption.

The fact that plaintiff was an adopted daughter was held to be proved chiefly by the fact that she was treated for years in the same way as her sister who was admittedly an adopted daughter, coupled with the natural father's direct and positive evidence of his consent and of the adoption.

*Lord Robertson.*—The question in this case is whether the respondent and appellant are both *keitima* adopted daughters of the deceased Ma Ye, a Burmese lady of considerable fortune, who died on the 14th April 1899, or whether the respondent alone stood in that relation to the deceased. Ma Ye had been married; her husband, Ko On, predeceased her by a few years; and she was childless. The two litigants are sisters by blood, being both daughters of a lady named Ma Ku, who was cousin of Ma Ye. The respondent, who is the elder of the two sisters by a year and some months, is admitted to be a *keitima* adopted daughter of Ma Ye; and the suit, which was initiated in the Court of the Judge of Moulmein by plaint on the 19th September 1899, was brought to obtain a declaration that the appellant is *keitima* daughter of Ma Ye, and entitled to a half of her estate. The written statement of the respondent was, in substance, a denial that the appellant had been adopted; and the first and leading issue settled for the trial of the cause, to which alone the attention of their Lordships was



invited was as follows : " Was the plaintiff adopted by the late Ko On and Ma Ye so as to entitle her to inherit ? "

Evidence was taken before the learned Judge of Moulmein, and on commission; and on the 7th November 1900 he decided in favour of the appellant. On appeal this judgment was reversed on 8th August 1901 by the Chief Court of Lower Burma.

Upon the issue in the suit, which has been about set forth, it is to be observed that the thing to be established is a relation between these two persons, Ma Ye and the appellant. Neither ceremony nor written document is required to constitute or initiate that relation. There must be, on the one hand, the consent of the natural parents, and, on the other, the taking of the child by the adoptive parent with the intention and on the footing that the child shall inherit. What has to be ascertained is whether with the consent of her parents the appellant was adopted by Ma Ye as her child and one of her heirs.

While the consent of the natural parent is a legal condition of the relation, this cannot seriously be said to present any substantial difficulty in the way of this appellant. From her early childhood she and her mother were left by her father to shift for themselves, and her mother had before her marriage lived in Ma Ye's house and was on affectionate terms with that lady. It happens that while the mother is dead the father was examined on commission, and he gave direct and positive evidence of his consent, and of the adoption; and the Judge has believed his testimony.

The question of fact whether the appellant was adopted by Ma Ye and treated by her as her *keitima* adopted daughter is to be determined as a question of evidence. A few of the more salient facts must be noted in the order of time.

The appellant, to begin with, was born in Ma Ye's house, in or about 1857, so that the early incidents of her childhood are sufficiently remote to account for inaccurate or varying recollection on the part of the witnesses. Between her birth and the death of her natural mother, which occurred in or about 1869, there is a period during which she lived at times with Ma Ye and at times with Ma Ku. From Ma Ku's death to her own first marriage, she lived with Ma Ye, a period of four or five years. In or about 1873 she married Ismail Lotia. While the circumstances of this marriage were not creditable and would have strained any but a strong tie, this was very soon condoned; the husband was employed by Ma Ye; the appellant's first two confinements took place in the house of Ma Ye; and the third in a house hired by that lady. The first husband died in or about 1884, and from his death the appellant and her children lived in Ma Ye's house until her second marriage in or about 1888. This second marriage, again, was not at first regarded as satisfactory, and it was delayed until Ma Ye's consent was obtained. From that time, the appellant, while living with her husband, was frequently at Ma Ye's house, and Ma Ye frequently at hers; and one of her children was constantly with Ma Ye.

Finally, Ma Ye died in the arms of the appellant, on 14th April 1899.

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GALE  
v.  
MA SA YI.

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GALE  
v.  
MA SA YI.

These bare facts in the appellant's life show that from her own birth to Ma Ye's death the two are closely associated in Ma Ye's house. Nor can it escape observation that on the death of mother and husband the appellant reverts to Ma Ye's house, and that even during the lives of mother and husband that house is more to her than it would be but for some special tie. Further, the care and authority of Ma Ye are exerted when occasion arises.

The outline thus drawn is filled up by numerous witnesses; and their Lordships, looking to the nature of the matters spoken to by those witnesses, cannot but ascribe a special weight to the impressions formed and the conclusions arrived at by the Judge of first instance. One consideration, however, must be mentioned as considerably narrowing the controversy.

At an early stage of the trial, the counsel for the respondent admitted that whenever the respondent and the appellant during their youth were together in Ma Ye's house they were treated in the same manner, except that the respondent alleges she was and the appellant was not entrusted with the keys. The significance of this admission lies in the fact that the respondent was, on her own showing, a *keitima* adopted daughter. Accordingly it is admitted that in Ma Ye's house the appellant was treated as a *keitima* adopted daughter was treated; and this applies to not weeks, or months, but years. (The matter of the keys does not detract from the admission, as presumably this was an indivisible privilege and the respondent was the elder sister.)

Again, the true question being, what was the relation? it is a question of secondary, although doubtless considerable, importance, when it began. The respondent and the learned Judges in the Court of Appeal have made much of the fact that the witnesses for the appellant ascribe the adoption, some to one period, and some to another. At the distance of thirty or forty years, it is not surprising that there should be this variance. But it has not been shown to the satisfaction of their Lordships how this objection meets or gets rid of the large body of evidence which goes to prove that Ma Ye called both girls her daughters and told people they were her daughters, while Ma Ye's conduct towards the appellant completely accorded with the truth of the statements thus ascribed to her. It seems probable that the true solution of the question as to the time of adoption is the simple one adopted by the learned Judge of first instance, that the father of the two speaks truly and that the appellant was adopted in her early childhood; that Ma Ye let the natural mother have the girl much with her while young; that the appellant's return to Ma Ye's house on the death of her natural mother looked of itself like an adoption; but that her position as Ma Ye's adopted daughter had existed all along. The vicissitudes of the appellant's matrimonial affairs throw her life into strong contrast with the more steady and stay-at-home life of the respondent: but these circumstances cannot abate the result already brought about, while in one view they render the more significant the intimacy which subsisted between the appellant and Ma Ye, from the earliest days of the appellant down to the last moments of Ma Ye.

The learned Judges in the Chief Court of Lower Burma have discussed the evidence in much detail, some of their appreciations and discriminations being of a character more generally possible to the Judge who heard and saw the witnesses. But, towards the close of his judgment, Mr. Justice Birks says :—

It is clear that the fact of adoption has been inferred from the conduct of Ma Ye to the plaintiff, and had Ma Me Gale (the appellant) been the only daughter of Ma Ku, I think the Judge might have been justified in his inferences. The conduct of this kindly old couple may be easily explained by the fact that the two sisters were very fond of each other, and that they did not wish to make any difference of treatment apparent.

This rather round about explanation is not to be found in the deposition of the respondent, who ought to have known, and is unsupported by the rest of the evidence. Nor does the learned Judge furnish any satisfactory explanation of the body of testimony which explains this identity of treatment by Ma Ye's own statements that both girls were hers. To say, as Mr. Justice Fox has done, that these things took place long ago, and that the Burmese are proverbially inattentive and inexact, is an observation which hardly meets the circumstantial and unshaken evidence given by several persons on a point the importance of which was crucial, and on which cross-examination has failed of any substantial effect.

Their Lordships are satisfied that the case was rightly decided by the Judge of the first instance, and they will humbly advise His Majesty that the appeal ought to be allowed, the judgment of the Chief Court of Lower Burma reversed with costs, and the judgment of the Judge of the Court at Moulmein restored

The respondent will pay the costs of this appeal.

### Privy Council.

(On appeal from the Chief Court of Lower Burma.)

*Before Lord Robertson, Lord Collins and Sir Arthur Wilson.*

MA WUN DI AND ANOTHER—APPELLANT

v.

MA KIN AND OTHERS—RESPONDENTS.

*Marriage.—Presumption of marriage from cohabitation with habit and repute—  
Nature of repute—Customs regarding relations of sexes—Privy Council—  
Practice—Point not raised in Lower Courts.*

The general presumption of marriage arising from cohabitation with habit and repute will only apply where there is a body of neighbours or some sort of public among whom the repute can arise.

In view of the nature of Oriental customs regarding the relations between the sexes, it is especially necessary, before drawing the presumption above referred to, to consider carefully whether the habit and repute proved is habit and repute of that particular status which constitutes lawful marriage.

Where it was urged that one of the issues framed in the suit was susceptible of a wider construction than had been given to it in the Lower Courts, but where the parties themselves, by their conduct of the case had construed it in the narrower sense, the Privy Council refused to entertain a question arising under the wider construction.

*Ma In Than v. Maung Saw Hla, S.J., L.B., 103, referred to.*

1904.

MA ME  
GALE  
v.  
MA SA YI.

Civil 1st  
Appeal  
No. 77 of  
1905.

March 19th,  
1906.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side. The following judgment of the Chief Court (Sir Harvey Adamson, Chief Judge and Mr. Justice Fox) was delivered on the 19th March 1906 by—

*Adamson, C.J.*—The question in this appeal is whether the first appellant, Ma Wun Di, was the legally married wife of the deceased Maung Gale, or whether she was merely his mistress.

Maung Gale's domicile was Burma, but his business required him to live for long periods in Siam. He went to Siam in 1887, and except for a few visits to Burma, he resided in Siam until his death in 1894. From 1887 to 1894, while in Siam, he cohabited with first appellant, and she lived in his house.

Maung Gale had a wife in Burma, the first respondent, long before he went to Siam. It is not alleged that he was ever divorced from her, nor is it alleged that the first appellant was not fully aware that Maung Gale had a wife in Burma.

The learned advocate for appellants has referred to the well-known principle that the presumption of marriage arising from cohabitation with habit and repute can be rebutted only by the clearest and most satisfactory evidence. It would in my opinion be quite unreasonable to allow this presumption to arise or have any weight in the case of a woman who enters into a union with a man with her eyes open to the fact that the man has already a legally married wife. It is not forbidden to a Burman Buddhist to have two wives at the same time, but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare, and that it is considered disreputable. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife, and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife.

The alleged marriage between the first appellant and Maung Gale occurred in Siam, and it is necessary to consider the marriage law of that country. The appellants, throughout the case, have assumed that the marriage law of Siam is exactly the same as the Burman Buddhist law of marriage. The respondents have produced a decree of His Majesty the King of Siam, dated 1898, defining the principles of the marriage contract in Siam, and the manner in which foreigners residing in Siam may obtain proof of marriage. The latter part of the decree need not be considered, because it was passed long after the union of the first appellant and Maung Gale. But the first part of the decree is important, as it shows that marriage is governed by exactly the same principles in Siam and in Burma. Marriage is a contract in both countries.

The witnesses produced by the appellants are four from Moulmein, and seven who were examined by commission in Siam.

The most important of the Moulmein witnesses is Maung Nyein. He accompanied Maung Gale to Siam, lived with him there, and was

present when Ma Wun Di and Maung Gale came together. He states that they were married, on the ground that they lived together, ate together, and slept together. It is quite clear from his evidence that there was no marriage ceremony. He states that the girl was asked for by Maung Gale's Burman friends who had accompanied him from Moulmein. No Shan officials were present, and there was no real ceremony. Had there been any marriage ceremony, he must have known it, and as he was a witness hostile to the respondents, he would not have failed to mention it. Now Maung Gale was a wealthy man. He was a man of considerable importance in Siam, and it is stated that he lived like a prince. A man of such importance, if he had been entering into a real marriage, would have done it with show and ceremony.

Besides Ma Wun Di, three concubines lived in Maung Gale's house. Each of the four had separate rooms. This condition of affairs is also somewhat inconsistent with the theory of marriage.

The next Moulmein witness, Shwe La, lived for some time with Maung Gale in Siam. He states that Maung Gale had Ma Wun Di and three lesser wives in the house. He sometimes ate with all of them, but he did not eat with any of them when he had visitors. Ma Wun Di was not dressed so well as the wives of Siamese with the same wealth as Maung Gale.

The next witness, Maung Bin, does not help the appellant much. He was a servant in Maung Gale's house, but he appears to have held all these women in considerable contempt. The last Moulmein witness, Shwe On, is important. He was in the house with Maung Gale and Ma Wun Di when Maung Gale died. He wrote to Maung Gale's relatives in Moulmein, but apparently did not think it worth while to mention that Maung Gale had a wife in Siam. He informed the British Consulate of the death. The Consul took charge of the property, without any objection being raised by Ma Wun Di. A relative from Moulmein subsequently took out letters of administration at the British Consulate without any objection being raised.

The Moulmein witnesses state that Ma Wun Di superintended Maung Gale's house, and kept his keys. But this is not inconsistent with the supposition that she was his head concubine.

I attach little weight to the evidence of the witnesses examined on commission in Siam. There was no means of cross-examining them or of testing their evidence in any way. They say that Maung Gale and Ma Wun Di lived together and borrowed money together, and were regarded as being man and wife. Some of them talk of a ceremony of marriage, at which there was a reception of Shan elders. But in the face of Maung Nyein's statements it is impossible to believe this evidence.

The appellants place much reliance on two documents. One is a certificate of nationality as a British subject of Maung Gale, in which under the heading "names of female relations living with Maung Gale" is entered "Ma Wun Di, wife." The other is a decree of a Siamese Court for money against Maung Gale, husband, and Ma Wun Di, wife.

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MA WUN DI  
v.  
MA KIN.

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MA WUN DI  
v.  
MA KIN.

I do not think that these documents afford a very strong inference that the relation of husband and wife actually existed.

On the whole I think that the evidence is quite as consistent, and in fact more consistent with concubinage than with marriage.

The conduct of Ma Wun Di, subsequent to the death of Maung Gale, raises the strongest inference that she did not regard herself as having the status of wife. She allowed the whole of Maung Gale's property to be taken possession of, first by the British Consul, and then by Maung Gale's relations from Moulmein, without raising a protest. Though Maung Gale died in 1894, and though a law suit was going on about his estate for many years, she never intervened, and it was not till 1902, eight years after Maung Gale's death, and after she had herself married again, that she took any steps to assert her rights as a married woman, or to obtain a share of his estate.

As regards Maung Gale it is very clear from his letter to his wife in Moulmein (Exhibit I) which was written in 1890, three years after he had united with Ma Wun Di, that he did not regard Ma Wun Di as having the status of a wife.

There is much evidence on the record that shows that it is customary for Burman foresters from Moulmein, who have to spend long periods in Siam on business, to take concubines in that country. One witness states that these girls can be got for Rs. 5 or 10 each. Maung Gale was a special sinner in this respect. At the same time he would have five or six concubines, all under the age of 16. Several of these lived in the same house as Ma Wun Di, and the evidence does not convince me that she differed in any way from them, except that she may have been the head of the harem.

If anything more is wanting to discredit the appellant's case, it is to be found in the circumstances under which the suit was brought. The respondents had a protracted litigation with Tha Hnyin, the brother of Maung Gale, which ended in Tha Hnyin compromising the case by paying Rs. 53,000. Within a few days after the compromise, a claim was made on behalf of the appellants for a share in Maung Gale's estate. It is Exhibit II. Ma Wun Di states that it was made without her authority or knowledge. Ma Wun Di has had to admit, after much prevarication, that she is financed for the purpose of this suit by Tha Hnyin and his son U Baw. The stamp for Rs. 900 which is on the plaint is endorsed by the Treasury Officer as having been sold to U Baw. It is therefore pretty clear that in this suit Ma Wun Di is only the tool of Tha Hnyin, who is grieved because he lost Rs. 53,000 in the previous suit.

For the reasons stated above I agree with the lower Court that Ma Wun Di was not the legally married wife of the deceased Maung Gale.

The learned advocate for respondents raised a question of Buddhist Law, as to whether a Burman Buddhist can legally marry a second wife, during the lifetime of his first wife, without her consent. I regret that, taking the view that I have taken of the facts, the question does not require a decision in this case. I may say, however, that the

arguments of the learned advocate, which he has embodied in a very interesting printed pamphlet, appear to me rather to throw doubt on the ruling of the Special Court in *Ma In Than v. Maung Saw Hla* (1), that a second marriage by the husband without the first wife's consent does not constitute a ground for a divorce at the instance of the first wife, than to prove the broader proposition that a second marriage under these circumstances is *null and void*. That there is a custom of polygamy among Burman Buddhists is beyond dispute. That it is sanctioned by texts in the Dhammathats is also beyond dispute. In view of the existing custom, I think that it is now too late to dissect the Dhammathats and to say that the law, as contained in certain portions of them, is not to be applied to Buddhists because it appears to have a Hindu origin and to have special reference to Hindu usages. I would dismiss the appeal with costs.

*Fox, J.*—I agree in thinking that on the evidence in the case it was not proved that Ma Wun Di was a wife of Maung Gale entitled to share in his estate.

The judgment of their Lordships of the Privy Council was delivered on the 2nd December 1907 by—

*Lord Robertson.*—The question in this appeal is one of fact ; and it has been decided against the appellants by two Courts. The case, however, deserves attention, for there has been a strong appeal made to the general presumption of marriage arising from cohabitation with habit and repute.

It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again, the habit and repute which alone is effective is habit and repute of that particular status which, in the country in question, is lawful marriage.

The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as matter of fact, a repute of marriage. But, in countries where customs are different, it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connexions not reprobated by opinion, but not constituting marriage.

In the present case the broad facts are these : a domiciled Burman, Maung Gale, had his house and wife at Moulmein in Burma ; his business took him to Siam, and there he lived for years with various other women, and with the principal appellant, Ma Wun Di, who, for shortness, will be called the appellant. The appellant has maintained that, while the other women were concubines, she was a wife, taken as a second wife, the first being all the time in Burma. The opposite

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(1) S.J., L.B., 103.



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contention is that, while the appellant was older than the other women (who all lived in the same house), and had, for that reason and also for reasons of choice, a stronger hold on the men, yet she has not made out the status of a wife. It is a noticeable feature of the case that the appellant, in her own evidence and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connexion; but her counsel in the appeal declined to maintain this part of her case, which was represented as resting on habit and repute. Now the first difficulty is that apparently this is a part of the world where there are not many people at all to act the part of neighbours or the public; and at all events there is no tangible evidence of recognition of this woman, in her quality of wife, by people external to the house and independent of it. What evidence she has is that of the people who either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence, and her stay in it as of longer duration, than those of the other women. In truth, when all is said, there is little more pointing to marriage than the use of the word "wife" by some of the witnesses; and the most cursory, as well as the most careful examination of the evidence shows that it is applied to persons whose status is not matrimonial.

Nor has the appellant, in evidence or in argument, faced the grave difficulty which arises from the existence of the lawful wife in Burma. The following observations of the Chief Judge are opposite and weighty:—

It is not forbidden to a Burman Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespected. On the contrary, I should be inclined to say that if a woman cohabits with a Burman whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife; and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife.

There remains to be noticed one point which the appellants' counsel treated as part of his case of habit and repute, and which seemed to be regarded as the most substantial item of it. Maung Gale, in 1887, obtained a certificate of nationality as "a British subject, proposing to travel in Siam." In 1891 he renewed it; and as part of the docket of renewal, which is signed by the Acting Vice-Consul, are the words: "Names of female relations living with Maung Gale: (1) Ma Wun Di, wife; (2) I Mun, sister-in-law." The argument upon this document is that the appellant could only be entitled to be named in this certificate of nationality if, by marriage, she had acquired her husband's certified nationality. On this, however, it is to be observed, first, that this is not evidence of repute at all; the Vice-Consul is not proved to have had any personal knowledge of these people at all, and the most it comes to is that, on this occasion, Maung Gale said that Ma Wun Di was his wife. But, further, any value or relevance which this writing has in the present case is entirely taken away by the addition of the sister-in-law, who on no theory was a naturalised

British subject. The truth probably is that the entry is put in merely as an item of information identifying Maung Gale, in addition to those given in the body of the certificate.

The appellants' counsel endeavoured to raise the question whether the second appellant, who is the son of the first appellant by Maung Gale, was not entitled to a share of Maung Gale's estate, even assuming no marriage to be proved. Whether the third issue in the suit was, in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct of the case, have construed it in the narrower sense of assuming the existence of a marriage; and the point urged by Mr. Roskill having been submitted in the conduct of the case to neither Court, their Lordships are unable to entertain this question.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Before Mr. Justice Hartnoll.

(Original Civil Jurisdiction.)

(1) THA TU	} v. MAUNG BYA.
(2) MA THEIN ME	
(3) TUN MYAT	
(4) MA SAW YIN	
(5) TUN U	

Council and J. R. Das—for plaintiffs

Pennel and R. N. Burjorjee—for defendant.

*Buddhist Law: Inheritance—Share of eldest daughter in property inherited by mother.*

A, female Burmese Buddhist, died leaving a husband and five daughters.

*Held*—that the eldest of these daughters was entitled to a quarter share of certain property which A had inherited from her mother.

*Ma Kyi Kyi and one v. Ma Thein and others*, 3 L.B.R., 8; *Ma Thin and one v. Ma Wa Yon*, 2 L.B.R., 255; referred to.

In this case Maung Tha Tu, Ma Thein Me and Maung Tun Myat, Ma Saw Yin and Maung Tun U, minors, by their next friend, Maung Tha Tu, their father, sue Maung Bya for the recovery of Rs. 29,514-2-8, which they claim as their inheritance.

They state that there was a certain piece of land measuring 17.11 acres situated at Mahlwagôn Kwin, Tamwe Circle, which was undivided family property left by one Ma Paw, who died about the year 1897. and who left behind her three heirs—her children Ko Taung, Ko Bya and Ma Shwe Meik. Ma Shwe Meik died in the year 1899 and left behind her husband Maung Tha Tu and five children—Ma Nyein and the 2nd, 3rd, 4th and 5th plaintiffs. Ma Nyein sold here share in the paddy land to Ko Bya. The land was subsequently acquired by Government and a sum of Rs. 98,382-8 was paid for it. Though they have asked the defendant to give them their share, he refuses to do so.

\* \* \* \* \*

1907.

MA WUN DE

v.

MA KIN.

Civil Regular  
No. 173 of  
1905.

July 11th,  
1906.

1906.

THA TU  
v.  
UNG BYA.

The fifth and tenth issues I shall deal with together. They are—

“To what sums out of the compensation awarded (if any) are plaintiffs or is any one of them entitled?” and

“To what share in Ma Paw's inheritance is each of the plaintiffs entitled?”

The property descended from Ma Paw, and when she died, she left behind three heirs—Ko Taung, Ko Bya and Ma Shwe Meik. It has been entitled by the case of *Ma Kyi and one v. Ma Thein and others* (1), that each of these heirs took an equal share in this land. So Ma Shwe Meik's branch possessed a third share. The plaintiff states that Ma Nyein has sold her share in the land to U Bya. In deciding the shares of her co-heirs we have therefore first to decide what was her share.

It is claimed by plaintiffs' counsel that Maung Tha Tu is entitled to half of the third share of the land, and that each of Tha Tu's and Shwe Meik's children is entitled to one-tenth of the third share. The point, however, is, whether Ma Nyein, who is the eldest daughter, was not entitled to a quarter of the third share, and so whether this amount should not be deducted before calculating the shares of Tha Tu and the other children instead of one-tenth. The latest case which I have been able to find dealing with the share of an eldest daughter is that of *Ma Thin and one v. Ma Wa Yon* (2). In that case it was decided that a daughter being an only child is entitled to claim a one-fourth share of her parents' joint estate from her mother, when the latter remarries after the father's death. So the case is slightly different to the present one. In the present case the mother died leaving five daughters, and the father has married again. Section 33 of the Digest on Buddhist Law gives the texts of the *Dhammalhats* on the partition between father and daughter on the death of the mother. The texts differ, but the weight of authority seems to be that the eldest daughter is entitled to a one-fourth share from the father. Section 45 deals with the partition when the father wishes to remarry. The *Yazathat*, *Dhamma* and *Manugyè* give the daughter a one-fourth share. The following reasons are given for favouring the eldest daughter:—

*Vilasa—*

Because the parents obtained him or her through the prayers offered at the early period of their wedded life, and they acquired property with his or her assistance.

*Dhammathatkyaw—*

Because she helps in the acquisition of property by working with the parent before the younger children are born; and when the mother passes away she assumes the duties of the mother in looking after household affairs, in preserving the integrity of the family and in rendering assistance to those relatives who are in need of it.

*Kyetyo—*

The eldest child gets one share because he or she upholds the parents' position and rank and continues the family

(1) 3 L.B.R., 8.      1      (2) 2 L.B.R., 255.

I must therefore hold that Ma Nyein's share was one-fourth of her mother's share.

The share to which the plaintiffs are entitled I therefore decide to be three-quarters of the one-third that Ma Shwe Meik's branch inherited.

\* \* \* \* \*

*Before Mr. Justice Hartnoll.*

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| 1. MAUNG CHO<br>2. LAW LIT<br>3. SIT LAY | } v. { | 1. MA CHA, WIDOW OF CHUAH HUAT.<br>2. EYONG CHIN SENG.<br>3. CHUAH MAR. |
|--|--------|---|

*Lentaigne*—for appellants (plaintiffs). | *Pennell*—for respondents (defendants).

*Trust for religious purposes—Suit to appoint trustee and recover trust property—Cause of action—Misjoinder—Right to sue stranger to trust—Heir of trustee—Civil Procedure Code, ss. 28, 43, 45, 539.*

B and C were alleged to have been joint trustees with A of a certain religious trust, the funds of which amounted to Rs. 2,300. Of this sum Rs. 2,000 was lent on a promissory-note in the names of A, B and C to D. The balance Rs. 300, and the promissory-note remained with A. A died, and the money and the promissory-note then passed into the hands of E, his widow and heir. A fresh trustee, F, was appointed, but E refused to make over the property to him. B and C now alleged the Rs. 2,000 was advanced in equal shares by them and by A, and that the shares advanced by them did not come out of the trust funds. In view of their claims, D refused to repay the Rs. 2,000 to the new trustee, F.

F, with other persons interested in the trust, brought a suit against E, B and C for (1) the appointment of a trustee, (2) a declaration that the Rs. 2,000 and the Rs. 300 were trust property, (3) the vesting in the trustee of the Rs. 300 and the papers belonging to the trust, and of the right to use for the Rs. 2,000, and (4) an order to E to hand over to the trustee the Rs. 300, the promissory-note and other papers belonging to the trust.

The suit was contested on two main grounds of law: the first of these was that the joining of E, B and C as defendants constituted radical misjoinder, inasmuch as the cause of action against B and C was not the same as that against E.

*Held*,—that the plaint disclosed only two real causes of action, namely, (1) the appointment of a trustee for the trust funds, and (2) the vesting in the trustee of the property of the trust in the hands of E; that B and C were concerned in the first cause of action as they were themselves members of the congregation interested in the trust; that the loan on the promissory-note did not constitute a cause of action distinct from the claim for the Rs. 300, and that therefore the joining of B and C with E did not constitute misjoinder.

The second ground on which the suit was contested was that so much of it as referred to the recovery of the property of the trust did not fall within the scope of section 539 of the Code of Civil Procedure.

*Held*,—that while section 539 of the Code of Civil Procedure gives no right of suit against strangers to the trust, E was not a stranger to it, but herself held in trust the property that had come into her hands, as the heir of all the rights and liabilities of A, and that it was sufficient for the purpose of bringing the suit under section 539, that B and C were alleged in the plaint to have been joint trustees with A. Whether they were so or not was a question of fact to be decided on the evidence.

*Narsingh Das v. Mangal Dubey*, (1882) I.L.R. 5 All., 163; *Mullick Kefait Hossein v. Sheo Pershad Singh*, (1896) I.L.R. 23 Cal., 821; *Ganeshi Lal v. Khairati Singh*, (1894) I.L.R. 16 All., 279; *Varajlal Bhaishanker v. Ramdat Harikrishna*, (1901) I.L.R. 26 Bom., 259; *Budree Das Mukim v. Chooni Lal Johurry*, (1906) I.L.R. 33 Cal., 789; referred to.

*Budh Singh Dudhuria v. Niradbaran Roy*, (1905) 2 C.L.J., 431, followed.

1906.

THA TU  
v.  
MAUNG BYA.

Special Civil  
2nd Appeal  
No. 70 of  
1906.

October 22nd,  
1906.

1906.

MAUNG CHO  
v.  
MA CHAW.

This suit was one brought under section 539 of the Civil Procedure Code, and the plaint set forth—

- (1) that the Hock Lein Kyong temple is a Chinese temple at Tavoy which was founded about forty years ago by one Chee What and to which all the Chinese at Tavoy have access ;
- (2) that the trusteeship was held by certain persons consecutively, the names of whom are given, and of whom the last is one Sit Lay, the third plaintiff ;
- (3) that a sum of Rs. 2,300 was at the credit of the temple funds, Rs. 2,000 of which had been lent out on a promissory-note in the names of Chuah Huat, Eyong Chin Seng and Chuah Mar,—the first being a deceased trustee and the second and third being the second and third defendants,—and the remaining Rs. 300 of which remained in the hands of Chuah Huat ;
- (4) that, when Chuah Huat died, this Rs. 300 and various papers came into the hands of Ma Chaw, Chuah Huat's widow and first defendant, and that Ma Chaw had been asked to hand over to the next trustee the property of the temple but that she had refused to do so ;
- (5) that demands had been made on Chu Lu Yin, to whom the Rs. 2,000 were lent, for payment of the principal and interest, but that he had refused to pay the monies over as the second and third defendants claimed to be entitled to such monies ;
- (6) that since Sit Lay had been appointed trustee he had made like demands against the defendants without success.

Hence the plaintiffs prayed for a decree under section 539, Civil Procedure Code—

- (a) appointing Sit Lay (or some other person or persons) to be a trustee of the temple ;
- (b) declaring that the promissory-note for Rs. 2,000 executed by Chu Lu Yin and the Rs. 300 cash in the hands of the first defendant was part of the trust property ;
- (c) vesting in such trustees the property belonging to the said temple and especially the papers, documents, cash and other property now in the hands of the first defendant and the right to recover the principal and interest due on the promissory-note ;
- (d) directing the first defendant to hand over to the said trustee the papers, documents and property belonging to the temple in her possession and especially the promissory-note for Rs. 2,000 executed by Chu Lu Yin and the sum of Rs. 300 or other sum in her possession belonging to the temple ;
- (e) for such further or other relief as would seem fit, and for costs.

Ma Chaw pleaded that she had received notices from the plaintiffs and other defendants to hand over the promissory-note to them, that she had kept it fearing if she handed it over to one party she would be sued by the other, and that she asked the Court to take it and strike her name off as a defendant. The second and third defendants pleaded *inter alia* that the Rs. 2,000 lent to Chu Lu Yin had been subscribed

equally by the deceased trustee Chuah Huat and themselves and so that they are entitled to Rs. 1,333-5-6. The District Judge gave a decree granting practically all the relief claimed in the plaint.

The defendants appealed and the main grounds of law of their appeal were—

(1) that section 539 of the Code of Civil Procedure has no application to suits brought to recover trust property from outsiders ;

(2) that there was radical and fatal misjoinder ;

The learned Divisional Judge found in favour of the defendants on both these points and accordingly varied the decree of the District Judge by merely directing that there would be a decree appointing the third plaintiff trustee of the temple subject to the conditions laid down by the District Judge.

From this decision a second appeal has been made to this Court. The main grounds of appeal are—

(1) that there is no radical misjoinder ;

(2) that, if there was any technical defect in instituting the suit, the lower Appellate Court should have held that as it had not been raised in the original Court it could not be any ground for altering the decree on appeal ;

(3) that the lower Appellate Court erred in holding that part of the matter which was dealt with was outside the provisions of section 539, Civil Procedure Code, and that for that portion the plaintiffs were not entitled to institute the suit.

It is clear that in the District Court the question of misjoinder was not raised, and so that in certain classes of misjoinder the point could be raised in appeal ; but in this case radical misjoinder of causes of action has been pleaded.

The subject has been discussed and decided in the following cases : *Narsingh Das v. Mangal Dubey* (1), *Mullick Kefait Hossein v. Sheo Pershad Singh* (2), and *Ganeshi Lal v. Khairati Singh* (3). In the first case it was held that the Court of first instance had properly rejected the plaint, the suit being open to the objection that different causes of action against different defendants separately had been joined, for which procedure no sanction was to be found in the Code of Civil Procedure. The decision in the other two cases followed the same line of argument. As I agree with the reasons given in the above-quoted cases, it is unnecessary for me to here recite those reasons afresh. To bring a suit under section 45 of the Code of Civil Procedure, the causes of action must be joint as to all the defendants, and if they are not, in my opinion, there is radical and fatal misjoinder, which cannot be cured by section 578 of the Code. In the case of *Varajlal Bhaishanker v. Ramdat Harikrishna* (4), it was held that although the defendants had not really been prejudiced by the misjoinder, it was impossible to hold that the case fell within section 578, that that section only applies to mistakes and irregularities

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(1) (1882) I.L.R. 5 All., 163.

(2) (1896) I.L.R. 23 Cal., 821.

(3) (1894) I.L.R. 16 All., 279.

(4) (1901) I.L.R. 26 Bom., 259.

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MAUNG CHO  
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subsequently committed in a suit which has been instituted in such a way as to give the Court jurisdiction to try it, that the suit must first be instituted in the manner allowed by law, and the law as it stands at present does not authorize a suit which is really two separate suits in which separate plaintiffs are concerned to be instituted, nor does it give the Court jurisdiction to entertain a suit thus instituted. With this view I agree.

It remains to apply the law to the present case and see whether there has been a fatal misjoinder of causes of action.

The plaint has not been too clearly worded, but it seems to me that there are really only two cases of action disclosed in it, namely, (1) the appointment of a trustee for the temple; (2) the vesting in him of property belonging to the temple that was in the hands of Ma Chaw. The second and third defendants were joined as they disputed the right of the trustee of the temple to two-thirds of the Rs. 2,000 secured by the promissory-note. As regards the matter of this promissory-note it does not seem to me to constitute against Ma Chaw a separate cause of action to the matter of the Rs. 300 and the other papers. It is part of the same cause, which is the property of the temple in the hands of Ma Chaw. Under section 43 of the Civil Procedure Code the plaintiffs were bound to include in the suit the whole of their claim which they were entitled to make in respect of the cause of action against Ma Chaw, and if they had not done so they would have lost the right to give in respect of the portion omitted.

The appointment of a trustee is a cause of action joint to all the defendants since they are all three members of the congregation of the temple. In the last paragraph of their written statement the second and third defendants even state that they are fit persons to be trustees. As regards the second cause of action, the vesting of the property of the temple that is alleged to be in the hands of Ma Chaw, I cannot hold that the cause is not joint to all the defendants. There is only one cause, and with regard to a portion of it the second and third defendants are, according to their own story, interested. It seems to me, therefore, that the plaintiffs were right to join them with Ma Chaw. If the property other than the Rs. 2,000 promissory-note had been a separate cause of action to it, then and in that case I think there would have been radical misjoinder, as the second and third defendants would only have been concerned with the Rs. 2,000; but holding as I do that as regards the property there is only one cause of action, then the fact that the second and third defendants are only concerned with a portion of the same cause does not seem to me to make the suit bad for misjoinder. The second and third defendants are in my opinion jointly concerned with the first defendant with respect to a portion of the same cause of action, and thus I consider that the plaintiffs have rightly joined them under section 45 of the Civil Procedure Code. Where in one cause of action there are several defendants, some of whom are only concerned with a portion of it, it seems to me that they can be sued jointly, and that section 28 of the Civil Procedure Code applies to such a case. Unless the whole cause of action was



included in the suit (and in consequence all necessary defendants joined), it might be held that section 43 of the Civil Procedure Code would preclude any suit being subsequently brought for a portion of the claim omitted in a prior suit. I am accordingly of opinion that this suit is not bad for misjoinder of causes of action.

The second point for consideration is whether a portion of the matter that was dealt with is outside the provisions of section 539 of the Civil Procedure Code, and so that for that portion the plaintiffs were not entitled to institute the suit. Numerous cases have been quoted to me; but I would refer to the case of *Budree Das Mukim v. Chooni Lal Johurry* (5), in which Woodroffe, J., has written an able and exhaustive judgment reviewing the case law on that section. At pages 804 and 805 the different cases are quoted and the learned Judge writes :—

There is no doubt but that claims by trustees against persons who are strangers to the trust and who set up a title hostile thereto such as alienees and mere trespassers holding adversely thereto are not within the section.

I concur in this view. The point remains in this case as to whether the defendants are strangers to the trust and mere trespassers, for section 539 of the Civil Procedure Code allows the vesting of property in the trustees under the trust. The plaint alleges that Chuah Huat was a trustee, that he has died and that the temple property in his hands has passed into the possession of Ma Chaw, his widow. If this was so, and Ma Chaw does not deny it, what is her position in the matter? As Chuah Huat's heir she succeeds to his rights and liabilities, as far as the estate of her husband that has passed into her hands is concerned. Any property of the temple that has come into her hands in this manner she would not hold as a stranger to the trust or as a trespasser in my opinion. It would devolve on her by law and by right of her being the heir of her deceased husband and she would be able for it in the same manner as he was. She, if it came into her possession, would stand in her deceased husband's shoes as far as it was concerned, and her position as heir seems to me to be quite different from that of a stranger to the trust or a trespasser. I am of opinion that as heir she would hold all such property as came into her possession in trust, and that she would succeed her husband as trustee of it as far as its safe custody and disposition was concerned. I therefore consider that an action against Ma Chaw with respect to such property would come within the scope of section 539, the opening words of which imply the existence of a trustee, who must be sued. As regards the second and third defendants it is clearly the meaning of the plaint that they were trustees jointly with Chuah Huat formerly, and are now with Ma Chaw as far as the Rs. 2,000 are concerned. The action against them as disclosed by the plaint seems therefore to be within the scope of section 539. The mere denial by defendants that they are not trustees is not sufficient to take the action out of the scope of section 539. If there is such denial and if it is alleged that the defendants are not persons who could be made defendants under section

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539, the question is a matter of evidence. This was held in the case of *Budree Das Mukim v. Chooni Lal Johurry* (5) referred to above—bottom of page 804—and again I would refer to the case of *Budh Singh Dudhuria v. Niradbaran Roy* (6), where it was held that it is not necessary, to make section 539 applicable, that the existence of the trust for public charitable or religious purposes alleged by the plaintiff should be admitted by the defendant, and that if the trust is disputed the question must be decided by the Court upon the evidence; but the evidence, however, must be strong and clear that the lands have been inalienably and in perpetuity dedicated by the founder for a public charitable or religious purpose. It therefore seems to me that the evidence must be considered to ascertain and decide whether the defendants are right and proper persons to be sued under section 539, and, if it is decided that they are, it must be again considered to decide what trust property there is belonging to the temple that should be vested in the trustee, if any, appointed by the Court.

Ma Chaw's position I have already discussed, and I have held that she must be considered to hold in trust all temple property devolving on her from her husband. In her examination she states that the only temple property she had when the suit was filed was the promissory-note.

As regards the second and third defendants there seems to me to be abundant evidence to prove that the Rs. 2,000 lent on the promissory-note was part of money raised by general subscription, and that with the consent of the congregation it was lent out in the names of Chuah Huat and the second and third defendants. The District Judge has carefully analyzed the evidence and I see no reason to differ from the conclusion at which he has arrived. Lu Yin states that the money was lent to him as temple money, and though he is brother-in-law to the second defendant he does not corroborate the defence story. Shwe Sin states that he wrote the note, and that the names of the second and third defendants were added because they were subordinate to Chuah Huat and in order that the temple's interest might be protected. Po Hla, second defendant's brother, states that the Rs. 2,000 was part of the balance of money collected. The second and third defendants produce no evidence to prove their story. I therefore hold it proved that the Rs. 2,000 were temple money and part of a general subscription, and that the second and third defendants' names were entered in the promissory-note as trustees.

I am accordingly of opinion that all three defendants are persons who can be sued under section 539, both for the purpose of the appointment of a trustee and for the purpose of vesting in such trustee all temple property with which they are or alleged themselves to be concerned. There remains for discussion the Rs. 300 and the account books, and here again I see no reason to disagree with the conclusion arrived at by the District Judge. Chuah Huat is proved to have stated publicly that there was a balance of Rs. 2,300. Sit Lay, whom I see no reason to disbelieve, states: "I saw the accounts over one month

(6) (1905) I.L.R. 2 C.L.J., 431.

after the death of Chuah Huat : that is how I know the amount. Third defendant brought the accounts to the temple." Kyu Ya, Chuah Huat's successor, according to a defence witness, announced his intention to sue on behalf of a temple. There is no good and satisfactory evidence that the books of account were handed over. Sit Hai and Kyaw Zun contradict each other, and Kyaw Zun is Ma Chaw's son. There seems to be no reason for disbelieving Sit Haw, whose daughter married Ma Chaw's son. Sit Lay seems to be a right and proper person to be trustee. He appears to have been already appointed by general consent. The decree passed by the District Judge seems to me to be suitable except that I consider that Ma Chaw should only be liable for the Rs. 300 to the extent of Chuah Huat's estate that has passed into her possession.

I accordingly set aside the judgment and decree of the Divisional Judge, and restore that of the District Judge, with the modification that the liability of Ma Chaw for the refund of the Rs. 300 is contingent on the estate of Chuah Huat that has passed into her hands being worth that amount apart from the other property mentioned in the decree. If his estate so described is not worth Rs. 300, Ma Chaw will only be liable for the Rs. 300, to the extent of the value of the estate that has passed into her hands.

The respondents in this Court will pay the cost of the appellants in this Court and in that of the Divisional Judge.

Before Mr. Justice Hartnoll.  
(Original Civil Jurisdiction.)

MAUNG GALE v. MAUNG BYA.

J. R. Das—for plaintiff. | Maung Kyaw—for defendant.

*Buddhist Law: Inheritance—Share of child of deceased first wife in property inherited during second marriage—Inherited property—Ancestral property.*

A, a Burman Buddhist, died leaving two children, B and C. B was the offspring of his first marriage, and C the offspring of a second marriage contracted after the death of the first wife. A had inherited certain property from his mother during the continuance of the second marriage. The second wife had died before A.

*Held*,—that B and C were entitled to equal shares in the said property.

*Shwe Neon v. Ma Mi Dwe*, S.J., L.B., 110; *Mi So v. Mi Hma Tha*, S.J., L.B., 177; *San On v. Mi Shwe Daing*, S.J., L.B., 223; *Tun Lu v. Po Yauk*, S.J., L.B., 255; *Ma Min E v. Ma Kyaw Taki*, P.J., L.B., 361; *Maung Ye v. Ma Me*, P.J., L.B., 418; referred to.

In this case Maung Gale, a minor by his next friend Maung Po Mya, sues Maung Bya for Rs. 21,862-12-6. He states that his grandmother, Ma Paw, died in 1897 leaving a piece of land specifically described in the plaint, and three children, her only heirs, Ko Taung, Ko Bya and Ma Shwe Meik, that his father was Ko Taung and that the latter died in 1898, leaving as his heirs himself and Ma Saw Ngwe, that the land has been subsequently required by Government, Rs. 98,382-8-0 having been paid to U Bya for it, and that U Bya refuses to pay him his share.

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MAUNG CHO  
v.  
MA CHAW.

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16th, 1906.

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The fourth and fifth issues are as to what share of Ma Paw's inheritance Maung Gale is entitled. As I have already noted, his father's share seems to have been one-third and so this one-third has to be apportioned between him and Ma Saw Ngwe.

Maung Taung had two wives, Ma Si and Ma Ngwe Nyun. Ma Si was his first wife and Ma Ngwe Nyun was the second. Ma Saw Ngwe is the daughter of Ma Si and Maung Gale is the son of Ma Ngwe Nyun. It is allowed by both parties that Ma Paw died during the continuance of the marriage between Ko Taung and Ma Ngwe Nyun, that Ma Si died before the marriage of Ko Taung and Ma Ngwe Nyun, and that Ma Ngwe Nyun died before Ko Taung. Ko Taung therefore inherited his share of Ma Paw's land after Ma Si's death and during the continuance of the marriage between himself and Ma Ngwe Nyun.

The land was Ko Taung's ancestral property and so would not seem to be in the ordinary accepted use of the term jointly acquired property, acquired during his marriage with Ma Ngwe Nyun. One of the earliest cases dealing with the difference would seem to be that of *Shwe Ngon v. Ma Min Dwe* (1), in which Jardine, J.C., went into the matter at some length. In the cases of *Mi So v. Mi Hmat Tha* (2) and *San On v. Mi Shwe Daing* (3), the distinction was again recognized. Again in the case of *Tun Lu v. Po Yauk* (4), the manner in which ancestral landed estate devolves in due course of inheritance was again considered. In the case of *Ma Min E v. Ma Kyaw Tahi* (5), the difference between the two kinds of property does not seem to have been discussed. In the case of *Maung Ye v. Ma Me* (6), it was ruled that where there are children of one father by a first marriage as well as by a second marriage, the children of the first marriage should have equal shares with the children of the second marriage in property inherited from a grand-parent after the death of the father. On a reference to the Digest of the Burman Buddhist Law concerning inheritance or marriage compared and arranged under the supervision of U Gaung, C.S.I., it appears that in certain places the distinction is recognized. I would refer to the following passages:—Vol. I, sections 7, 172, 237, 244, 245, 246, 247, 252; Vol. II, sections 257 and 264.

In deciding, therefore, what the share of Maung Gale is in his grand-mother's property it must be remembered that the land inherited by his father from Ma Paw was inherited as ancestral property, and that it was not land acquired during the continuance of his parents' marriage by their joint skill and labour. Section 237 of the Digest mentioned above Volume I, collects the texts of the various *Dhammathats* on the subject of partition between sons of the same parents and their step-brothers. These texts, as a general rule, deal with property acquired during the second marriage as property acquired jointly, and do not differentiate between property acquired by the mutual skill and labour of the man and wife and that inherited from their respective parents. Several texts give the offspring of the

(1) S.J., L.B., 110.

(2) S.J., L.B., 177.

(3) S.J., L.B., 223.

(4) S.J., L.B., 255.

(5) P.J., L.B., 361.

(6) P.J., L.B., 418.

second marriage two shares of the jointly acquired property and the offspring of the first marriage one share. The reasons given for favouring the children of the second marriage are that they inherit through both parents (*Kaingza*) and because their mother acquired the property with the object of benefiting her own children (*Kyelvo*). Where property is acquired jointly by mutual skill and labour during the second marriage, there is certainly reason for favouring the children of that marriage more than the children of the first marriage; but this reason does not seem to exist when the property acquired during the second marriage devolves in due course of inheritance. It is acquired by process of law, and not by the mutual effort of both husband and wife. The texts are peculiarly silent on the point, and in this section of the Digest I can only find three that directly relate to it.

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The *Dhamma* states :—

The hereditary estate brought by the father to the second marriage shall be inherited exclusively by the offspring of that marriage. But as regards the property inherited by him during the second marriage, the children of that marriage shall share it with those of the first marriage.

The *Cittara* says :—

The father's hereditary estate shall be divided into four shares; the children by the first wife shall receive three shares and those by the second one share.

The *Kyannel* says :—

A couple own separate property as well as jointly acquired property. On the death of the wife the husband marries again but takes no property to the second marriage. The man and his second wife die leaving a son of the marriage. The daughter by the first wife shall receive her mother's separate property. Of the property acquired during the first marriage the daughter by the first wife shall take two shares and the son by the second wife one share. The father's separate property shall be divided equally between the two children. If any property be taken by the widower to the second marriage, the offspring of that marriage shall, if a girl, receive one-fourth of it. In the event of the offspring of the first marriage being a boy, the offspring of the second marriage shall, if a boy, receive one-sixth, and if a girl, one-eighth of it.

I would further invite a reference to sections 245 and 246 of the Digest, which deal with partition between the sons of the marriages. In section 245 is the 66th section of Book X of the *Manugye*, on which great stress has been laid by the plaintiff. The texts lay down no general rule. The *Kungya* does not differentiate between hereditary and other acquired property. The *Dhamma* gives the son of the first marriage preference over the other two. The *Manugye* gives preference to the son of the marriage during the continuance of which the hereditary property was acquired, because he has the right to inherit the property through both parents. In section 246 the *Cittara* says :—

The son of each father shall take the property brought by his father to the marriage. The mother's separate property shall be divided equally among all the three sons. The property acquired jointly during the lifetime of each father shall be divided into four shares; his son shall receive two shares and the two sons of the other two fathers one share each.

The meaning of this text would seem to be that the mother's hereditary property is to be divided equally amongst the sons of the three

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marriages. It seems to me that no general rule can be gathered from the texts as to the devolution of ancestral property in a case like the present, and the fairest way will be to accept what the *Dhamma* lays down in section 237 of the Digest, that is, that as regards property inherited by the father during the second marriage the children of that marriage shall share it with those of the first marriage. As it was not acquired by the joint effort of the father and the second wife, I fail to see why the offspring of the second marriage should be favoured over the children of the first marriage. I therefore hold that in the present case Ma Saw Ngwe and Maung Gale should take equal shares in the landed property inherited by their father from Ma Paw.

\* \* \* \* \*

*Criminal  
Appeal  
No. 442 of  
1907.*

*Before Sir Charles Fox, Chief Judge.*

KING-EMPEROR v. PO SAING.

Pencil—for respondent.

*August 26th,  
1907.*

*False—trade-mark—Use of receptacle bearing trade-mark—Intend to defraud—  
Indian Penal Code, ss. 480, 482.*

A sold illuminant kerosene oil of his own refining in tins originally issued with oil of the same description by B and bearing B's trade-mark. The tins had been altered in minor particulars, and paper labels indicating the true manufacturer of the oil had been affixed. The bodies of the tins, however, on which B's trade-mark appeared, remained unaltered.

*Held*, that A had committed an offence punishable under section 482 of the Indian Penal Code.

*Memi Chand v. Wallace*, (1907) I.L.R. 34 Cal. 495, referred to.

The respondent was prosecuted and charged with having used a false trade-mark—not a false property mark as stated by the District Magistrate.

It has a small refinery near Prome, and refines an illuminant oil from crude petroleum. This refined oil he put into tins which had been issued by the Burma Oil Company filled with illuminant oil refined by it.

The tins issued by it bear one or other of its trade-marks, and the name of the Company prominently embossed on them. A buyer buys the tin as well as the oil in it.

All that the respondent did before issuing oil refined by him in such tins was to take off the handles and replace them with handles not bearing the Company's name, to change the caps, and to affix a paper label with words denoting that it was oil manufactured at a Prome refinery.

The respondent was convicted by the Magistrate by whom he was tried, but was acquitted on appeal by the District Magistrate. This is an appeal directed by the Local Government against such acquittal.

The District Magistrate held that it was quite clear that the respondent had no intention to pass off his oil manufactured by the Burma Oil Company. He apparently formed this conclusion from the fact that his oil was sold in old tins which had been altered to some

extent, and that he affixed paper labels to the tins to show that the tins contained his oil and not the Company's oil.

The part of section 480 of the Indian Penal Code applicable to the case as is follows :—"Whoever uses any case, package or other receptacle with any mark thereon reasonably calculated to cause it to be believed that any goods contained in such receptacle are the manufacture or merchandise of a person, whose manufacture or merchandise they are not is said to use a false trade-mark." Section 482 of the Code provides that whoever uses a false trade-mark shall be punished unless he proves that he acted without intent to defraud.

These provisions of the law were enacted for the protection of trade-marks. A trade-mark is adopted with a view to showing that the goods to which it is applied are the manufacture or merchandise of the person who has adopted it. It affords a ready means of distinguishing one person's manufacture or merchandise from another's, and it is well known that in eastern countries especially a person's or firm's goods or manufacture may acquire and retain great reputation by reason of their bearing a particular trade-mark, although buyers of the goods may not know the name of the manufacturer or of the person who owns the trade-mark. It is not essential that this should be known.

The first question in the case is whether the issue by the respondent of his illuminant oil in tins bearing the Burma Oil Company's trade-marks was reasonably calculated to cause it to be believed that the oil contained in the tins was illuminant oil manufactured by the Company. In considering this question, the fact that traders in such oil or even wary purchasers would not be likely to believe that oil sold in old tins with clumsy handles and caps was the Company's oil, is immaterial. Adopting the rule stated in *Nemi Chand v. Wallace* (1) what has to be considered is whether the sale of the respondent's oil in tins bearing the Company's trade-marks is calculated to deceive the incautious, ignorant or unwary purchaser. The question is not to be confined to buyers by the tin : the possible belief of buyers by the bottle, cup or other small measure on seeing oil drawn from a tin bearing a trade-mark must be considered.

Nothing could be more calculated to lead an ignorant or unwary purchaser who asks for oil by the name which a trade-mark has acquired to believe that he is getting the oil which he wants than to have a tin bearing the trade-mark offered to him, or to see the oil offered him drawn from a tin bearing the trade-mark. There can, in my opinion, be no doubt that in putting his illuminant oil in tins bearing the Company's trade-marks used for their illuminant oil, and by letting his oil go out from his refinery in such tins with the knowledge that his oil would be sold in or from such tins, the respondent brought himself within the words of section 480 of the Indian Penal Code. Consequently he was liable to punishment under section 482 of the Code unless he proved that he acted without intent to defraud. The effect of this section is that when it is proved that a person has done an

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act covered by section 480 it is to be presumed that he did the act with intent to defraud unless he proves the contrary.

The words "with intent to defraud" are very comprehensive, and comprehensive wording must have been purposely adopted, for it can rarely if ever happen that the buyer direct from a manufacturer or merchant is deceived as to a mark on goods being a genuine trade-mark, or being legitimately applied to goods.

The fraud committed by any one who knowingly applies to his goods the trade mark or a colourable imitation of the trade mark of another is of two kinds. He fraudulently attempts to obtain for himself some of the benefit which the owner of the trade-mark is entitled to, and he commits a fraud on the public by enabling others to sell his goods to the public on the misrepresentation that they are the goods properly sold with the trade-mark. In the present case the respondent must clearly have had in his mind the possibility of his oil in the tins in which he issued it being taken to be the Company's oil: otherwise there was no meaning in his changing the handles and caps, and putting on a label.

No one could reasonably suppose that the minor alterations of the handles and caps would effectually distinguish one manufacture of oil from another manufacture. It must have been apparent to the respondent that his paper labels gummed on the tins could be easily removed from them even if they did not come off in the course of transport. But even if he was such a simpleton as to believe that he was effectually distinguishing his oil from the Company's oil by the measures he adopted, the fact remains that he issued his oil in tins bearing the Company's trade marks very prominently shown on the tins, and he must have known that those trade marks were the property of the Company and that they were adopted by it to distinguish its oil from other manufactures of oil. He must have seen that the trade marks were the most prominent marks on the tins, and the most likely marks to attract the eyes of purchasers, and to lead them to believe that the oil in the tins was oil manufactured by the owners of the trade-mark.

Under the circumstances I find it impossible to hold that the respondent proved that in using tins bearing the Company's trade-marks he acted without intent to defraud. I accordingly set aside the District Magistrate's order of acquittal and find the accused guilty of an offence punishable under section 482 of the Indian Penal Code.

The case being the first in which the Company has prosecuted any one for using tins bearing their trade marks unlawfully, I do not think that a severe punishment is called for.

The sentence on the respondent is that he pay a fine of rupees fifty or in default that he suffer seven days' rigorous imprisonment. This sentence must not be taken as a criterion of what sentence should be passed if the illegal use of the tins in question is repeated, or of how the infringement of any other trade-mark should be punished.

Lest there should be any misapprehension as to the effect of this judgment in connection with the use of old oil tins bearing a trade-mark, I will add that an oil tin may be used for any purpose and for selling anything in except the particular oil—in this case illuminant kerosine oil—for which the owner of the trade-mark has adopted the mark on it.

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### Full Bench—(Civil Reference.)

Before Sir Charles Fox Chief Judge, Mr. Justice Irwin, C.S.I.,  
and Mr. Justice Moore.

Civil  
Reference  
No. 2 of  
1907.

SHWE THA v. { 1. MA SAW HUA.  
2. WILLIAM ANDREWS.  
3. BA CHO.

December  
2nd,  
1907.

*Suit for dissolution of marriage—Proof of adultery—Evidence—Service of summons—Personal service—Advertisement in newspaper—Indian Divorce Act, 1869, s. 7, 50—Civil Procedure Code, s. 82.*

A suit under the Indian Divorce Act, 1869, for dissolution of marriage on the ground of adultery cannot succeed without convincing evidence in proof adultery.

Where the only admissible evidence in support of such a suit was to the effect that the wife (respondent) had left her husband, and had been seen on two occasions in company with two boys in a house that was not alleged to be a brothel.

*Held*,—that the evidence was insufficient to establish the fact of adultery.

A mere statement by the petitioner that he could not ascertain the respondent's proper address, without proof that reasonable efforts had been made to ascertain it, was held not to be a sufficient ground for dispensing with personal service of summons upon such respondent.

The case comes before this Court for confirmation of a decree for dissolution of marriage made by the Divisional Court.

The petitioner and respondent are Christian Karens and were lawfully married on the 29th January 1895. The ground on which the petitioner sought for dissolution of his marriage with the respondent was that she on the 17th April 1906 left the place where they were leaving for Rangoon in company with the co-respondents, and that he had subsequently learnt that she had gone with them to Calcutta and that she had committed adultery with both of them in Rangoon and in Calcutta.

In his evidence he said that on the above date she had said she would go to Rangoon to buy carriages which were to be used to let out for hire in Toungoo. He gave her Rs. 1,000 and five hundred rupees worth of jewellery for the purpose of buying the carriages. She never returned and had never sent any letter to him. In May of the same year a friend of his in Calcutta had sent him a telegram which was to the effect that he had seen the respondent there with two boys. On the 19th May this same friend wrote a letter giving some information he had received about her having committed adultery, but not with either of the co-respondents. The addresses of the respondent and co-respondents were not given in the petition. At the time of presenting his petition the petitioner applied that instead

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of the summons being sent in the ordinary way the summons to the respondent should be advertised in local papers in Rangoon and Calcutta. On this the Judge ordered that notices be published in the "Statesman" newspaper, Calcutta, and in the "Rangoon Times" in eight issues of each paper. The petitioner asked that this might be done on the ground that he could not ascertain his wife's proper address.

The only method adopted to bring the proceedings to the notice of the respondent and co-respondents was by publication of the summonses in the above papers. The procedure was irregular. Section 82 of the Code of Civil Procedure does not contemplate substituted service being granted except after reasonable endeavour has been made to serve a summons personally.

Maung Po Min, the petitioner's friend in Calcutta, stated that in May 1906 he saw the respondent in the house of a Burmese broker who lived in Kolatollah Street, Calcutta. He said he did not know the broker's address, but it is obvious that he could have easily found it out if he had taken the trouble to do so. He said he saw her living there with two boys—one of them looked like a Native and the other like an Eurasian. He had seen the Native many times in Toungoo, but he does not identify him either with William Andrews (the first co-respondent) or Maung Ba Cho (the second co-respondent). He said he saw the boys in the house twice but he did not know if they lived there. The broker had told him that the Eurasian had gone away, and that the respondent had slept with the Native boy for three days and nights. He afterwards saw her with the Eurasian boy and she said she would return to Burma in three or four days.

The information he received from the broker living in the house is hearsay, and there is no admissible evidence to prove the truth of the information; the broker was not called as a witness, nor was his evidence taken on commission.

Under section 7 of the Indian Divorce Act (1869), the Courts of this country have to act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. The general rule under both the Civil Procedure Code and the rules of the Divorce Courts is that personal service upon the party to be effected should only be dispensed with when every reasonable effort has been made to trace him or her without success. In the present case reasonable efforts do not appear to have been made to trace either the respondent or the co-respondents. The mode in which the summons was held to have been served was ineffective and no attempt seems to have been made to serve a copy of the petition as required by section 50 of the Act.

Again the Divorce Court of England requires convincing evidence in proof of adultery. In the present case the admissible evidence is only to the effect that the respondent was seen on two occasions in a house in Calcutta which is not alleged to have been a brothel, in company with two boys. This does not, in my opinion, constitute

sufficient proof that the respondent committed adultery with the co-respondents or with either of them.

Under the circumstances I think the decree for dissolution of petitioner's marriage with respondent should not be confirmed.

*Irwin, J.*—I concur.

*Moore, J.*—I concur.

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Before Mr. Justice Irwin, C.S.I.

LALLA DAVEE NARAYANA LALL v. MOHAN PANDAY  
AND CHOTKOO PANDAY.

*Palit*—for applicant (defendant). | *Dantra*—for respondents (plaintiffs).

*Security for performance of decree—Method of enforcing bond—Execution—*  
*Civil Procedure Code, ss. 253, 545, 546, 549, 583.*

Civil Revision  
No. 112 of  
1905.

December  
12th, 1907.

The proper method of enforcing a security bond given under proviso (c) to section 545 of the Code of Civil Procedure for the due performance of a decree is by execution.

*Venkapa Naik v. Baslingapa*, (1887) I.L.R. 12 Bom., 411; *Kusaji Vinayak R. Parobhu*, (1898) I.L.R. 23 Bom., 478; *Jamsedji v. Bawabhai*, (1900) I.L.R. 25 Bom., 409; *Thirumalai v. Ramayyar*, (1889) I.L.R. 13 Mad., 1; *Janki Kuar v. Sarup Rani*, (1895) I.L.R. 17 All., 99; followed.

*Kali Charun Singh v. Balgobind Singh*, (1888) I.L.R. 15 Cal., 497; *Tokhan Singh v. Udwani Singh*, (1894) I.L.R. 22 Cal., 25; *Subjoo Das v. Balmakund Das*, (1895) I.L.R. 25 Cal., 212; dissented from.

*Shyam Sundar Lal v. Bajbai Jainarayan*, (1903) I.L.R. 30 Cal., 1060; referred to.

The petitioner is the one survivor of two persons who gave security under the proviso (c) to section 545 of the Civil Procedure Code for the due performance of such decree as should be passed in appeal No. 128 of 1898 of the Court of the Assistant Commissioner, Hanthawaddy.

The Court in which the original suit had been instituted was the Court of the Civil Judge of Insein. When that Court ceased to exist on 16th April 1900 the suit was transferred under section 43 (2), Lower Burma Courts Act, to the Subdivisional Court of Insein. The final decree was passed by that Court on 10th July 1901.

The decree-holders applied to the Subdivisional Court to execute its decree against the sureties. The application was dismissed on 12th August 1901 on the ground that the bond bound the sureties to pay the Rs. 2,500 into Court on any day that the Appellate Court should order and no such order had been made by the Appellate Court. The order of dismissal was upheld on appeal as correct on the merits (Miscellaneous Appeal No. 228 of 1901 of the Chief Court, judgment dated 29th May 1902).

The decree-holders on 12th May 1903 applied to the District Court of Hanthawaddy as the Appellate Court to order the sureties to pay the Rs. 2,500 into Court. They were unsuccessful, and ultimately this Court in revision decided, on 9th February 1905, that the District Court had no jurisdiction, as the proceedings in the appeal should have been transferred to the Divisional Court when the Court of the Assistant Commissioner ceased to exist (Civil Revision No. 50 of 1904).

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On 28th February 1905 the decree-holders applied to the Divisional Court for an order to the sureties to pay Rs. 2,500 into Court. Notice was issued to the sureties. They objected (1) that the bond is no longer binding on them, and (2) that if it is binding the only way to enforce it is by regular suit.

On 29th July 1905 the Divisional Court ordered the sureties to pay Rs. 2,500 into that Court on or before 1st August 1905.

The money was not paid in, and on 2nd August 1905 the Divisional Court ordered that a certified copy of the bond, with a certified copy of the order of the Court, be transmitted to the Subdivisional Court for the needful action in execution. The learned Judge then proceeded to give reasons for holding that the proper course is by execution, and that the bond is still binding on the sureties.

The sureties apply for revision of that order. Before the hearing one of the sureties died, and his legal representative has not applied to have his name placed on the record. So far as the deceased is concerned the petition has abated.

In the petition for revision it is said that there are only two ways of enforcing the bond if it could be enforced, namely, by assignment of the bond for the purpose of instituting a regular suit, or by execution in the Court of first instance. At the hearing, however it was argued that it cannot be enforced at all by execution. I shall deal with this point now.

In *Venkapa Naik v. Baslingapa* (1), the effect of section 583 read with section 253 of the Civil Procedure Code was considered, and it was held that the proper method of enforcing a bond given under section 545 was by execution. This ruling was followed by the same Court in *Kusaji v. Vinayak R. Parabhu* (2), and in *Jamsedji v. Bawabhai* (3). In the latter case the learned Judges were urged to dissent from the earlier ruling, and gave detailed reasons for refusing to do so.

The High Court of Madras approved of the Bombay ruling in *Thirumalai v. Ramayyar* (4), and so did the High Court of Allahabad in *Janki Kuar v. Sarup Rani* (5).

The High Court of Calcutta, on the other hand, in *Kali Charun Singh v. Balgobind Singh* (6), held that section 253 does not apply to persons who gave security for costs in an Appellate Court under section 549. In *Tokhan Singh v. Udwan Singh* (7) that ruling was extended to sureties for the decree under section 545. This was followed in respect of section 546 in *Subfoo Das v. Balmakund Das* (8), but somewhat doubtfully on the part of one of the learned Judges, who was influenced more by precedent than by any other reason.

In *Shyam Sundar Lal v. Bajbai Jainarayan* (9), the security given by the appellant was in the shape of a mortgage of his property and without any surety. The only objection made to execution was

(1) (1887) I.L.R. 12 Bom., 411.

(2) (1898) I.L.R. 23 Bom., 478.

(3) (1900) I.L.R. 25 Bom., 409.

(4) (1889) I.L.R. 13 Mad., 1.

(5) (1895) I.L.R. 17 All., 99.

(6) (1888) I.L.R. 15 Cal., 497.

(7) (1894) I.L.R. 22 Cal., 25.

(8) (1895) I.L.R. 23 Cal., 212.

(9) (1903) I.L.R. 30 Cal., 1060.

section 99 of the Transfer of Property Act. and this was overruled without any reference to sections 253 and 583 of the Civil Procedure Code.

The weight of authority is greatly in favour of the Bombay rulings, and the arguments in favour of those rulings commend themselves to my mind. I hold that the proper procedure to realize the bond in the present case is by execution, and the only error I find in the order of the judge of the Divisional Court sending the bond to the Subdivisional Court is that he ought to have sent the original bond and not a copy.

The finding of the Divisional Court that the bond is still binding on the sureties is objected to on the ground that it deprives the sureties of the right of appeal which they would have if the point were left for decision by the Court executing the decree. The learned advocate says he would not have applied for revision at all if the Divisional Court had not decided this point and decided it against him. As to this I think it is sufficient to say that the petitioner raised the point himself in the Divisional Court, and he cannot be heard to say now that it ought not to have been decided by that Court. It is my duty under section 622 to pass such order as I think fit. I think it would be most improper to reopen this question which was fully argued before the Divisional Court, and leave it to be a cause of further indefinite delay in the Court of first instance.

I dismiss the application with costs. Advocate's fee, Rs. 85.

### Full Bench.

*Before Sir Charles Fox, Chief Judge Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.*

TWET PE ALIAS SHAN GALE AND SAN U *v.* KING-EMPEROR.

*Agabeg*—for 2nd appellant. 1 No appearance for 1st appellant,

*Theft and taking gratification to restore stolen property—Cattle theft—Joinder of charges—Double conviction—Alternative charge—Indian Penal Code, ss. 71, 215, 380—Criminal Procedure Code, 1898, ss. 235, 236.*

The two accused stole a bullock and returned it to the owner two days later on payment of Rs. 20. They were tried at one trial both for theft under section 380 of the Indian Penal Code and for offences under section 215. The Magistrate found that the theft had been committed for the express purpose of obtaining money for the bullock's return. He convicted the accused of both the offences charged, and passed a separate sentence for each offence.

*Held*,—that in view of the short time that elapsed between the theft and the return of the bullock, the Magistrate's finding as to the purpose of the theft was justifiable, and the theft and the return might be considered to be a series of acts so connected as to form the same transaction. There was therefore no misjoinder of charges.

*Held, further* (Irwin, J., dissenting),—that the actual thief is not liable to be convicted of an offence under section 215 in respect of the property which he himself stole. As the facts proved justified the conclusion that the accused were themselves the thieves, the convictions under section 380 were upheld and those under section 215 set aside.

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DAVEE

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*v.*  
MOHAN  
PANDAY.

*Criminal  
Appeals  
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*December  
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Where the question is likely to arise whether a person who has accepted a gratification for the return of stolen property is the actual thief or not, alternative charges should be framed under section 236 of the Code of Criminal Procedure.

*King-Emperor v. Nga To*, 2 L.B.R., 23; *Queen-Empress v. Muhammad Ali* (1900) I.L.R. 23 All., 81; followed.

*Ok Gyi v. Queen-Empress*, S.J., L.B., 449; *Shwe Kya v. Queen-Empress*, S.J., L.B., 461; *Queen-Empress v. Tun Byu*, P.J., L.B., 226; *Crown v. Nga Shein*, 1 L.B.R., 203; *King-Emperor v. Po Sein*, 2 L.B.R., 14; referred to.

*Fox, C.J.*—The following are the facts as found by the Magistrate :—

On the night of the 9th decrease Nayon 1267 B.E., (3rd June 1907) a bullock belonging to the complainant was lost from underneath his house where it was tied up to a post. He made a search for the animal, but failed to find it. He then asked Nga Maung (2nd witness for prosecution) to make an enquiry about it. On the same day (4th June) Nga Maung went to Kyaikyedwin, and he met the two accused there. He informed them that the complainant had lost a bullock and asked them if they knew who had stolen it. Both accused said “ငွေရှိမှသာဝယ်” — “If there is money, there is bullock,” and demanded Rs. 20. Nga Maung came back to complainant and told him what accused had said. On the following day (5th June) he got Rs. 20 and then went to accused who were in Kyaikyedwin village. He offered the money, when first accused Twet Pe said that he would not accept it from any other person than complainant himself, and took Re. 1 only. Nga Maung came back and informed complainant what first accused had said. On the same day, at 1 P.M. complainant went with Nga Maung and Nga Pan Tha Gyi (3rd witness for prosecution) to the jungle where they met the two accused. They demanded Rs. 20, when complainant said that he would pay the money on their producing the bullock. They, however, insisted an immediate payment of the money. On this complainant paid Rs. 19 to first accused Twet Pe in the presence of Nga Maung and Pan Tha Gyi. Both accused then took complainant into the jungle. The first accused Twet Pe pointed out the bullock, which was tied up to a bush, untied the animal, and made it over to complainant. The second accused Nga San U was present. Nga Maung and Pan Tha Gyi were not present; they returned home immediately after the payment of the money to the first accused Twet Pe. Both the accused went away together after the bullock had been made over to the complainant.

The above facts are fully supported by the evidence. Upon them the Magistrate convicted both accused of offences punishable under sections 380 and 215 of the Indian Penal Code and passed separate sentences on them for each offence. The chief grounds of appeal are to the effect that the accused having been held guilty of theft, not by direct evidence but by inference drawn from facts which proved the commission of an offence under section 215 of the Indian Penal Code, there should not have been convictions and sentences under both sections 380 and 215 of the Code and that if the accused committed both theft in a building and an offence punishable under section 215 the offences were distinct and did not form part of the same transaction, and therefore the trial of the accused for such offences in one trial was illegal. This last contention may be dealt with first. The Magistrate found that the accused stole the complainant's bullock for the express purpose of obtaining money for its restoration. This finding was, in my opinion, justified, and the negotiations and return of the bullock followed within such a short time of the theft of it that the theft and what followed until the return of the bullock may reasonably be considered as a series of acts so connected together as to form the



same transaction. Consequently section 235 of the Code of Criminal Procedure authorized the trial of the accused in one trial for both the theft and the taking of the gratification, and subject to what I have to say upon the applicability of section 215 of the Penal Code to the case of actual thief, they were liable to be convicted, and to have separate sentences passed on them for each of the offences. None of the clauses of section 71 of the Penal Code apply to the case of a man committing a theft and subsequently taking a gratification to restore the stolen property; consequently there was nothing to forbid separate sentences for each offence held proved if actual thieves can be also convicted of an offence under section 215 of the Indian Penal Code. This view accords with the ruling in *King-Emperor v. Nga To* (1).

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The first ground of appeal assumes that the accused were convicted of theft solely on the inference drawn from the proved fact that one of them received money to restore the stolen bullock, in conjunction with the proof of facts justifying the conclusion that the two accused were acting in concert. This is not a justifiable assumption. The connection of the accused with the bullock is shown in the combination of facts proved, and on those facts it is reasonable to conclude that the two accused were in possession of the bullock soon after the theft. But assuming that this was not established, the combination of facts and the conduct of the accused and their knowledge of where the bullock was, afforded reasonable ground for presuming that they had actually committed the theft of the bullock themselves. Amongst the illustrations given in section 114 of the Evidence Act of what a Court may presume is one that a man who is in possession of stolen goods soon after the theft is either the thief or that he has received the goods knowing them to be stolen, unless he can account for his possession. The illustrations to the section are not exhaustive in respect of the presumptions mentioned therein, and other facts beside possession of stolen goods soon after a theft may justify the presumption that a person has stolen the goods. The facts proved in this case against the accused appear to me to fully justify the conclusion that they actually stole the bullock.

Another question has been raised which was not considered in the case of *Nga To*. It is contended that section 215 of the Penal Code does not apply to the case of an actual thief who takes or agrees to take a gratification for restoring or helping to restore the property he has stolen. In *Queen-Empress v. Muhamrad Ali* (2), Aikman, J., says that a careful perusal of the section will show that it was never intended to apply to the actual thief, but it was intended to apply to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover the stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence. In *Nga Ok Gyi v. Queen-Empress* (3), Ward, J. C., held that if the accused, who had offered to find the stolen property for the owners in consideration of

(1) 2 L.B.R., 23.

(2) (1900) I.L.R., 23 All., 81.

(3) S.J., L.B., 449.

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payment of a certain sum of money, and had received the money, had himself stolen the property, the section did not apply, for the curious reason that the accused could not well have adopted more effectual measures than he did for causing the offender (that is to say, himself) to be apprehended and convicted. In *Nga Shwe Kya v. Queen-Empress* (4), Ward, J.C., again set aside a conviction under the section when the accused had also been convicted of the theft. In this case he gave his views as to what the offence made punishable by the section consisted of. In *Queen-Empress v. Nga Tun Byu* (5), Aston, J.C., held that a thief might be convicted of an offence punishable under section 215 as well as of theft. In the *Crown v. Nga Shein* (6), Copleston, C.J., held that a thief who took a gratification for restoring what he had stolen might be convicted of theft and also under section 215, but where the theft was proved, not by direct evidence but by inference drawn from the facts which proved commission of the offence under section 215, there should not be separate convictions and sentences.

The wording of the section is peculiar. It was probably adapted from a provision of the English law which is now contained in section 101 of 24 and 25 Vict., C. 96. I cannot adopt Ward, J.C.'s view that the offence under the section lies in the fact that the offender did not use every means in his power to bring the actual thief to justice. The language is that whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover moveable property, of which he shall have been deprived by any offence punishable under the Code shall be punished unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence. This to my mind means that any one who takes or agrees to take a gratification under pretence or on account of helping the owner to recover, say, stolen property commits an offence at the time he takes or agrees to take the gratification, but he may, so to speak, condone the offence and avoid punishment by using all means in his power to cause the offender who took the property to be apprehended and convicted of the offence which he committed. This is the view which appears to have been taken by the English Courts of the similar provision of the English law—see Russell on Crimes, Cap. 29.

In regard to whether the section applies to the actual thief who takes or agrees to take a gratification for restoring the property he has stolen, I think there is much force in Aikman, J.'s remark that section 215 was not intended to apply to the actual thief. It appears to me that the inherent intention to be gathered from the language was to provide punishment for an act done by some one other than the person who has deprived the owner of his property. The person who commits the offence of taking a gratification can only be absolved from it and its consequences by showing that he used all means in his power to cause the person who deprived the owner of his property to be apprehended and convicted. No offender is under any legal obligation to cause himself to be apprehended and convicted, or to

(4) S.J., L.B., 461.

| (5) P.J., L.B., 226.

| (6) 1 L.B.R., 203.

confess to having committed an offence. The section in question makes it obligatory on any one who takes or even agrees to take a gratification on pretence of or on account of helping an owner to recover his stolen property to use all means in his power to bring the actual thief to justice.

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It could scarcely have been intended by the section to make a thief, who possibly and probably benefits the owner by restoring his property to him, liable to greater punishment because he takes money for restoring the property and does not hand himself up to justice and confess his crime.

The English decisions on the similar provision of law are all in cases in which a person other than the actual thief was prosecuted for taking a gratification.

Upon consideration I am of opinion that where upon the facts proved the conclusion is justified that an accused who has taken or agreed to take a gratification for helping to restore stolen property to the owner was himself the thief or engaged in the commission of the theft, he is liable to be convicted of and sentenced for the theft, but he is not liable to be convicted under section 215 of the Indian Penal Code also.

In cases in which the question is likely to arise the charges should be in the alternative under section 236 of the Code of Criminal Procedure. I would in the present case uphold the convictions and sentences for theft in a building, but would set aside the convictions and sentences under section 215 of the Penal Code.

*Irwin, J.*—The facts found are fully set out in the judgment of the learned Chief Judge; I need not repeat them. I agree that there is no doubt about the correctness of the findings on the evidence.

The first ground of appeal is based on the ruling of the late Chief Judge, Mr. Justice Copleston, in the *Crown v. Nga Shein* (6). With great respect, I am unable to assent to the proposition that the question of the liability of any person to conviction of an offence can depend on the manner in which the commission of the offence is proved. Apart from that point in the present case the appellants are proved to have been in possession of the stolen bullock soon after the theft, and the theft is therefore proved by circumstantial evidence distinct from the proof of the offence under section 215.

The second ground of appeal is based on the same ruling. On this point also I am unable to follow Mr. Justice Copleston. I agree with the learned Chief Judge that the theft and the negotiations which ended in the ransom of the bullock are a series of acts so connected together as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure.

On the question whether the actual thief is liable to conviction under section 215, I should be glad if I could answer the question in the negative, because I think such a double conviction is contrary to the principles of natural justice. But I cannot say that I think it con-

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trary to law. This is not an isolated instance of such an anomaly ; another instance is to be found in *King-Emperor v. Nga Po Sein* (7).

Section 215 seems to me to be designed for the punishment of a person who makes, or assists the thief or receiver to make, profit out of a theft in one particular way ; and it was enacted because thieves and receivers had devised means by which the profit could be attained without affording evidence of such facts as would support a conviction of either theft or receiving. The section seems to be aimed mainly at thieves and receivers who are too cautious and too clever to let themselves be caught under other sections of the Code.

If, then, a person who is probably the thief is liable to conviction under section 215, is there anything to indicate that a person who is proved to be the thief is not so liable ? In my opinion, if the Legislature intended to make any such restriction it would be found in Chapter XIX of the Code of Criminal Procedure, and if it were intended to limit the punishment on a double conviction of theft and of the offence under section 215 it would be found in Chapter III of the Penal Code. There are no such restrictions.

I am thus constrained to hold that the double convictions and sentences in the present case are not illegal. But I consider the double sentences improper and unjust. A thief who returns the stolen property in consideration of a payment does not thereby inflict any additional injury on the owner ; on the contrary the owner effects the transaction because he thereby recovers part of the loss that was caused to him by the theft.

I would therefore uphold the convictions under both sections and the sentences for theft, but would set aside the sentences under section 215.

*Hartnell, J.*—As the proved facts have been set out by the learned Chief Judge it is unnecessary to set them out again. On them it seems to me beyond doubt that the convictions under section 380 of the Indian Penal Code are correct. I am unable, with all due respect, to follow the reasoning of Copleston, C.J., in the case of *Crown v. Nga Shein* (6). If inferences drawn from proved facts support a conclusion that a person has committed more offences than one of which he may be properly convicted, I can see no reason why he should not be convicted of such offence. In the present case the connection of the appellants with the stolen animal so soon after the theft warrants to my mind the conclusion that they were the thieves in the absence of reasonable explanation by them, which explanation they have not offered.

The proved facts certainly also seem to me to be so connected together as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure. The most difficult point in the appeal remains for consideration, and that is, whether a person who is proved to be the thief can also be convicted under section 215 of the Indian Penal Code, if it is shewn that he has taken a gratification to restore the property and has not then handed himself up to

justice. In other words, was section 215 of the Code intended to apply to the thief himself? The learned Chief Judge has reviewed the available decisions on the point and it is unnecessary for me to further discuss them. The section may be so read that it would apply to the thief himself, as it may be argued that the thief after taking the gratification has the power of causing himself to be apprehended and convicted, and that, if he does not do so, he does not use all means in his power to cause the offender to be apprehended and convicted; but I think that to so read them would be to strain and give them an unnatural meaning. The natural meaning of the section seems to me to be that an offender under it must be some one other than the actual thief. To say the most in favour of the Crown on the point it seems to me that there is a reasonable doubt as to the meaning of the words, and since there is, in my opinion, the benefit of such, by a well-known principle of interpretation, should be given to the subject. As regards the justice and propriety of punishing criminals both under section 379 and section 215 with respect to the same property, it seems to me that in the majority of cases it would be most unfair to give a heavier combined sentence under sections 379 and 215 than the sentence that would have been passed under section 379 only. In cases that merely come under section 379, the property is often totally lost or destroyed; but where a gratification is taken to restore stolen property, it often and in the majority of cases finds its way back to the owner intact and unhurt for very much less than its value.

After due consideration I would hold that section 215 of the Indian Penal Code does not apply to one proved to be the actual thief. I would, therefore, set aside the convictions and sentences passed on Twet Pe and San U under section 215 of the Indian Penal Code, but I would confirm the convictions and sentences passed under section 380 of the Indian Penal Code.

### Full Bench.

*Before Sir Charles Fox, Chief Judge, Mr. Justice Irwin, C.S.I.,  
and Mr. Justice Hartnoll.*

KING EMPEROR v. THA HLAING.

*Security proceedings—Preventive sections—Order for security on expiration of substantive sentence of imprisonment—Order for imprisonment in default of furnishing security—Criminal Procedure Code, 1898 ss. 106, 120, 123.*

A person convicted of criminal intimidation was sentenced to three months' rigorous imprisonment, and was further ordered to give security to keep the peace for six months under section 106 of the Code of Criminal Procedure. At the time of the sentence the Magistrate added an order to the effect that if the accused failed to give the security demanded, he was to undergo six months' simple imprisonment. The case was referred to the Chief Court by the Sessions Judge as it had been held in a previous case that an order made in similar circumstances for imprisonment in default of furnishing security was premature.

*Held (Irwin, J., dissenting),—that it was unnecessary to interfere with the order in revision.*

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*Per Irwin, J.*—The order for imprisonment in default of furnishing security should be set aside, as such an order cannot properly be passed until the accused has failed to give the security demanded, and therefore not until the time from which the security is to be given has arrived.

*Per Fox, C.J.*—The law requires that a person ordered to give security shall be imprisoned until the security is given or the period for which it is demanded expires. The Magistrate's order for imprisonment in default of security was therefore strictly speaking superfluous, but did not call for interference. It is convenient that the warrant to the jail should mention the demand of security and should contain a warning of what the law requires if the security is not furnished.

*Per Hartnoll, J.*—When security to keep the peace is demanded under section 106 of the Code of Criminal Procedure, an order should be passed at the time of sentence for the accused's detention in simple imprisonment unless he shall have given the security on or before the expiration of his substantive sentence of imprisonment.

*Queen-Empress v. Harilal*, Ratanlal's Unreported Cases, 432; *Queen-Empress v. Pandu Khandu*, Ratanlal's Unreported Cases, 774; referred to.

*Queen-Empress v. Saing Gyi*, P.J., L.B., 245, dissented from.

*Irwin, J.*—The Sessions Judge in submitting the case for orders refers to letter No. 121—16-50, dated 13th September 1905, from the Registrar of this Court. It is desirable to set out the facts which led to the issue of that letter. In Criminal Appeal No. 315 of 1905, when a prisoner had been sentenced by a Magistrate to imprisonment and to execute a bond to keep the peace for three years and in default to three years' simple imprisonment, I set aside the order imposing imprisonment in default as both premature (section 123, Criminal Procedure Code) and *ultra vires* under clause 2 of that section. The Sessions Judge, at the instance of the District Magistrate, wrote to the Registrar inquiring whether in future a Magistrate when passing sentence of imprisonment accompanied by an order to furnish security for keeping the peace, should abstain from passing sentence of imprisonment in default of the security being furnished. He was informed that my ruling must of course be followed, but a case might be referred with a statement of the practical difficulties that arise in carrying out the ruling.

The Sessions Judge in making the present reference has not submitted any statement of the practical difficulties that arise.

In this case the accused has been sentenced to three months' imprisonment and ordered to execute a bond with sureties to keep the peace for six months; and in default of furnishing this security he has been sentenced to simple imprisonment for six months, to commence at the expiry of the substantive sentence. This combined sentence is provided for in the warrant form, Criminal 99, which was printed before the decision of Criminal Appeal 315 of 1905.

Under section 120, Code of Criminal Procedure, the period for which security is required in the present case commences on the expiration of the substantive sentence or imprisonment. Under section 123, sub-section (1) if the convict does not give such security on or before the date on which the period for which security is to be given commences, he shall be detained in prison. The plain meaning of these enactments seems to me to be that he cannot be ordered to be detained in prison in default of giving security before the commencement of the period for which he

is to give security. The part of the warrant in Form 99 which relates to imprisonment in default of furnishing security is, in my opinion, a warrant which the law does not authorize the Magistrate to sign until the conditions precedent to the issue of such order, as laid down in section 123, sub-section (1), have actually been fulfilled, namely, that the convict has not given the security on or before the date on which the period for which it is to be given commences. He can give the security at any time he likes up to that date, and until that date he cannot render himself liable to imprisonment for failing to give the required security.

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There is a very close similarity between the case now under consideration and the case of a person ordered under section 118 to give security and to whom the Magistrate grants time under section 120 (2) to find the security. The distinction between the two is that under section 123 the one shall be committed to prison and the other shall be detained in prison. I do not think it can be disputed that the order committing to prison cannot be issued until default in furnishing security has actually been made. I am quite unable to distinguish between the expressions "shall be committed to prison" and "shall be detained in prison" by saying that the one is a direction to the Magistrate to issue a warrant and that the other prescribes for a detention in prison which does not depend on an order of Magistrate. The logical result of this would be that the Magistrate's order should end with the order to furnish security, and that if the warrant is to contain any reference to the security, that reference should be limited to a declaration that an order to give security has been made. It is not necessary to consider what action the Superintendent of a jail would be likely to take on such a warrant. To my mind the expressions "shall be committed to prison" and "shall be detained in prison" are absolutely *ejusdem generis*. The construction I put on the section is supported by the rulings of the High Court of Bombay in *Queen-Empress v. Harilal* (1) and *Queen-Empress v. Pandu Khandu* (2).

The question seems to me to resolve itself into this ; does section 123 authorize the Magistrate to make an order inflicting imprisonment which is to be wholly and from its commencement conditional on a future event ? I do not know of any instance in which such an order is authorized and I think such authority cannot be found in section 123.

I would set aside so much of the Magistrate's order as directs that Tha Hlaing be imprisoned in default of furnishing security.

*Fox, C.J.*—The Magistrate's findings and orders were as follows:—

I find that the accused Nga Tha Hlaing is guilty of the offence specified in the charge, namely, that he threatened to stab the headman and committed the offence of criminal intimidation, and I direct that he shall undergo three months' rigorous imprisonment under section 506 of the Indian Penal Code, and I further direct that he shall bind himself in the sum of Rs. 50 with two sureties (respectable householders) to keep the peace for a period of six months, *failing which he shall undergo six months' simple imprisonment under section 106 of the Code of Criminal Procedure.*

(1) Ratanlul's Unreported Cases, 432.I (2) Ratanlul's Unreported Cases, 774.



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The warrant under which the accused was committed to jail contains the following clauses :—

And whereas at the time of the passing of the aforesaid sentence the said Nga Tha Hlaing was further ordered to enter into a bond for Rs. 50 with two sureties to keep the peace for a period of six months and has failed to comply with that order, this is further to authorize and require you to keep the said Nga Tha Hlaing in simple imprisonment for the said period of six months from the expiration of the said sentence unless the said Nga Tha Hlaing shall in the meantime be lawfully ordered to be released.

There can be no question as to the form of warrant prescribed not being strictly correct and suitable to the case. The main question for consideration is whether the part of the Magistrate's order commencing with the words "failing which" was legal.

Under section 120 of the Code of Criminal Procedure the period for which security is required shall in cases such as the present one commence on the expiration of the sentence passed on the accused for the offence of which he had been found guilty. Under sub-section (1) of section 123, if a person ordered to give security under section 106 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, if already in prison, be detained in prison until he gives the security, or if he fails to give the security, until the period for which security was required has expired. The detention in prison is thus provided for by an express provision of law and does not depend upon an order of the Magistrate. In the case of a sentence for an offence it is in most cases open to a Magistrate or Judge to pass a sentence up to a stated maximum; in some cases a minimum sentence is laid down. In the case of detention in prison for failure to give security, a Magistrate has no choice as to how long the period shall be, or as to what description of imprisonment the person failing to give security shall suffer. He has some choice as to the length of period for which security shall be demanded, but having fixed that, the period of detention in prison and the description of imprisonment to be suffered on failure to give the security are not within his power to regulate.

Strictly then the part of the Magistrate's order now in question was not correct because the law provided for what was to happen if the accused failed to give the security required. The order, however, does not appear to me to call for interference. It may be that in view of the provision of law it was superfluous, but it merely stated what was to happen according to law, and it seems to me that the question regarding it resolves itself into a question of form only. If the part of the Magistrate's order in question is cancelled the result to the accused would be precisely the same as if it stands.

The question remains whether in such a case as the present the warrant committing the accused to jail for the sentence for the offence committed should mention the order for security and authorize the Superintendent of the jail to detain the accused if he shall not have furnished the security on or before the expiration of his sentence. I see no strong objection to this being done. If a warrant for only the sentence for the offence is issued, the Superintendent of the jail would

as a matter of course release the accused at the expiration of his sentence, whereas the law requires that if the accused has not given security by that time, he shall be detained in prison for a further time and under certain conditions. It appears to me that a warrant which serves to inform the jail authority of what the law requires, and enables the law to be carried out, is not open to objection. The required alteration of the present prescribed form is a matter to be dealt with administratively.

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I would not interfere in the case in revision.

*Hartnoll, J.*—Maung Tha Hlaing has been convicted under section 506 of the Indian Penal Code and sentenced to undergo three months' rigorous imprisonment. It was further directed that he should bind himself in the sum of Rs. 50 with two sureties to keep the peace for a period of six months, failing which he should undergo six months' simple imprisonment under section 106 of the Criminal Procedure Code.

The point for decision is as to whether the order passed under the Criminal Procedure Code is legal. Section 120 (1) of the Code lays down that, if any person in respect of whom an order requiring security is made under section 106 is, at the time such order is made, sentenced to imprisonment, the period for which such security is required shall commence on the expiration of such sentence. In the present case Maung Tha Hlaing was sentenced to imprisonment at the time the order was made under section 106 of the Criminal Procedure Code, and so the period for which the security is required of him will commence on the expiration of his sentence. Section 123 (1) lays down that if any person ordered to give security under section 106 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it. In the present case the words of the section relating to committal to prison do not apply, but the concluding words of the section do. When the period for the giving of the security commences, Maung Tha Hlaing will be already in prison and so, unless he has then furnished security, it is imperative by the words of the section that he be detained in prison until the period for which he has been ordered to give security expires or until within such period he furnishes it. That being so, it seems to me that the strictly correct order for the Magistrate to have passed when passing his order for the giving of security should have been as follows:—"And I further direct that Maung Tha Hlaing do execute a bond for the sum of Rs. 50 with two sureties (respectable householders) to keep the peace for a period of six months, and that, if he has not given such security on or before the expiration of his substantive sentence under section 506 of the Indian Penal Code, he be detained in prison in simple imprisonment for a further term of six months or until within such period he furnishes the security required."

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Such an order is all the more necessary in that the Magistrate cannot tell when the substantive term of imprisonment will expire. Considering sub-section (5) of the section it also seems to me to be necessary for the Magistrate when ordering the conditional detention to state whether the imprisonment is to be simple or rigorous. In the present case, though in my opinion the terms of the Magistrate's order are not strictly correct and though I consider that the words should run as I have stated, yet the effect of the order is to practically carry out what is the law, and so I would not interfere in revision.

With regard to the argument that a convict may be detained in prison after the expiration of his sentence though immediately before it expires he may have given security and that he may be detained therefore illegally, I would remark as follows. The security has to be taken by the Magistrate and cannot be given at the jail, section 123 (4). In all cases under section 106 and in the very large majority of cases under section 118 the convict has to sign the bond, and so has to be produced before the Magistrate to do this, or else the Magistrate has to send the bond to the jail to be signed by him. I do not therefore see how there can be a detention after security has been given except in the very rare case of minors that come under proviso 3 to section 118. If the Magistrate has the convict produced before him and takes the security, he would then release him; if he sent the bond to the jail to be signed, he would send a release warrant with it authorising the release after the bond had been signed. There remains the very rare case of minors coming under proviso 3 of section 118. In their case it is possible that they might be detained after they have given security, but very improbable. A reasonable interpretation must be given to the law, and I cannot believe that the Legislature ever intended that convicts, who have been ordered to give security, should be released at the expiration of their substantive term of imprisonment, when they have not given security, owing to the jail authorities not having in their possession a warrant which will enable the law to be carried out, the more especially as in practice it is only the rare cases of minors, who come under section 118, proviso 3, that would be prejudicially affected, and then only very rarely, by the Jail authorities having such authorization.

The ruling in the case of *Queen-Empress v. Saing Gyi* (3) has been brought to my notice as not being in agreement with the views that I have expressed above. With all due respect to the learned Judicial Commissioner, Mr. Aston, I am unable to agree with him when he ruled that a Magistrate is not authorized to record an order directing security to be given and in the same order directing the person from whom security is demanded to be imprisoned if security be not furnished. Under Act X of 1882 (the Code of Criminal Procedure then in force) the second paragraph of section 120 laid down: "In other cases such period shall commence on the date of such order." The committal to prison in such a case would seem to me to follow at once in accordance with the provisions of section 123.

The present Code (V of 1898) gives more latitude as it enables a Magistrate to fix a later date for the giving of security than the date of the order requiring the security, and in this respect the present Code seems fairer and juster in that, if a man can give security, time can be allowed to him to give it, and in that case he would not be committed to prison till that time expired. This reason does not exist when a man is sentenced to, or undergoing, a substantive term of imprisonment.

As regards the warrant—Criminal Form No. 99—it would seem to me to be in order except that I would delete from it the words "and has failed to comply with that order" as Maung Tha Hlaing according to law has time to comply with it up to the time his substantive sentence of imprisonment expires.

I do not consider the correct procedure for adoption in cases that come under section 123 (2) of the Code of Criminal Procedure as the point does not arise in the present reference.

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Before Mr. Justice Hartnoll.

THA DWE v. A. L. V. R. S. ALLAGAPPA CHETTY.

S. S. Palker—for appellant (defendant).

R. S. Dantra—for respondent (plaintiff).

Civil 2nd  
Appeal  
No. 30 of  
1907.

December  
19th, 1907.

*Fraudulent transfer—Sale of property to defeat creditor's claim—Good faith of purchaser—Consideration—Burden of proof—Indian Evidence Act, 1872, s. 106.*

A sold certain immoveable property to B his brother, by registered deed about the time that he was being pressed for payment of a debt due to C. Subsequently to the sale, C obtained a decree against A for the amount of the debt. Thereupon brought a suit against B for a declaration that the property in question was the property of A, alleging that the sale was a fraudulent one effected for the purpose of preventing C from realizing the debt.

*Held*,—that the circumstances afforded sufficient ground for finding that A had sold the property to defeat C's claim, and that the burden lay upon B of proving that he had bought the property in good faith and for adequate consideration.

*Bhagwaní Appaji v. Kedari Kashinath*, (1900) I.L.R., 25 Bom., 202, referred to.

*Amarchand Jetthathai v. Gokul Bapu*, (1902) 5 Bom. L.R., 142, followed.

Allagappa and two other Chetties trading under the firm name of A.L.V.R.S. by their agent Allagappa Chetty sued Maung Tha Dwe to declare that a certain house and land were the property of their judgment-debtor Maung Tha Dun Kyaw. They alleged that they sued Maung Tha Dun Kyaw for Rs. 1,143-9-0 and obtained a decree against him on the 23rd June 1906, and that Maung Tha Dun Kyaw on the 15th waxing *Pyatko*, 1267 B.E. (8th January 1906), in order that he might not pay the debts that he owned them, fraudulently executed a registered deed of sale of the property, the subject of the suit, in favour of his brother Maung Tha Dwe.

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Maung Tha Dwe did not deny that the plaintiffs obtained the decree alleged against Maung Tha Dun Kyaw; but he pleaded that the sale of the house and land to him was a *bona fide* sale for valuable consideration.

The Township Court found that the transaction was a fraudulent one made to defeat Maung Tha Dun Kyaw's creditors and granted the decree asked for. On appeal the Divisional Court confirmed this decree, and against this latter decree the present appeal has been laid. The Judge of the Divisional Court held that there was no room for doubt that so far as Maung Tha Dun Kyaw was concerned the conveyance was intended to defeat the plaintiffs; he therefore considered that the burden of proving the conveyance was *bona fide* and for valuable consideration lay on the defendant. The first three grounds of appeal are that the Divisional Court erred in law, in holding that the burden of proving that the sale was *bona fide* lay on the appellant, also erred in holding that Maung Tha Dun Kyaw intended to defeat the plaintiffs, claim in the absence of any evidence, and assuming that such was Maung Tha Dun Kyaw's intention erred in throwing the burden of proof on appellant merely on the ground of such assumption and in the absence of any evidence as to collusion between Maung Tha Dun Kyaw and Maung Tha Dwe. It seems to me that there were grounds for the Divisional Court to come to the conclusion that the conveyance was made to defeat the plaintiffs. There were the facts that the debt was owed and was being pressed for repayment and that about that time this conveyance was made to Maung Tha Dwe, Maung Tha Dun Kyaw's brother. The mere fact that Maung Tha Dun Kyaw and Maung Tha Dwe were brothers would under the circumstances suggest collusion. The Divisional Court having found that the transfer was made to defeat the plaintiffs' claims on Maung Tha Dun Kyaw, I am of opinion that the burden of proof was rightly thrown on Maung Tha Dwe to show that the sale was *bona fide*. The law on the subject was amply discussed in Mr. Justice Batty's lengthy judgment in the case of *Bhagwant Appaji v. Kedari Kashinath* (1) and the burden of proof was also discussed in a case somewhat analogous to the present, namely, that of *Amarchand Jethabhai v. Gokal Bapu* (2). It seems to be only common sense that where a plaintiff has shown that a transfer has been made to defeat his claims in favour of his debtor's brother that the brother should show his good faith in the matter. Section 106 of that Evidence Act seems to me in point. The matter of consideration and good faith is from the nature of things especially within the knowledge of the debtor's brother.

The last ground of appeal is that the judgment of the Divisional Court does not conform with the provisions of section 574 of the Code of Civil Procedure. It is certainly meagre and should have dealt with the case more in detail; but in my opinion it is not so deficient as to justify any interference in the present appeal.

I accordingly dismiss the appeal with costs.

(1) (1900) I.L.R. 25 Bom., 202. I (2) (1902) 5 Bom. L.R., 142.

## Full Bench.

Before Sir Charles Fox Chief Judge, Mr. Justice Irwin, C.S.I.,  
and Mr. Justice Hartnoll.

KING-EMPEROR v. KWE HAW AND 16 OTHERS.

Criminal  
Appeal  
No. 114 of  
1907.

January 6th,  
1908.

Mc Donnell, Assistant Government Advocate—for the Crown.

*Search by police-officer—Entry—Witnesses to search—Persons not qualified to witness search—Ward-headman in Rangoon—Respectable inhabitant of locality—Burma Gambling Act, 1899, ss. 6,7—Criminal Procedure Code, 1898, ss. 102, 103.*

A place is not entered under the provisions of section 6 of the Burma Gambling Act unless the officer entering is accompanied by two or more respectable inhabitants of the locality.

Where certain premises were entered by a police officer, accompanied only by two ward-headmen appointed under the Lower Burma Towns Act by the Commissioner of Police, Rangoon.

*Held* (Irwin, J., dissenting),—that in view of the fact that the ward-headmen in Rangoon are appointed by the Commissioner of Police, have police duties to perform, and are in some cases being constantly called on to attend searches, they do not fall within the class of persons whom the Legislature intended to be called as witnesses, and that therefore the premises in question were not duly entered in accordance with the provisions of section 6 of the Gambling Act.

*Ah Shee v. King-Emperor*, 3 L.B.R., 229, followed.

*King-Emperor v. Maung Cho*, 2 L.B.R., 43; *Curtis v. Stovin*, (1889) 22 Q.B.D., 512; *Rex v. Hall*, (1822) 1 B.&C., 123; *Mi Hauk v. King-Emperor*, 4 L.B.R., 121; referred to.

*Fox, C.J.*—This is an appeal directed by the Local Government against an order acquitting the respondents who have appeared, and others against whom the appeal has been withdrawn, of offences under sections 11 and 12 of the Burma Gambling Act, 1899. It is admitted that the case is on all fours with the case of *Ah Shee v. King-Emperor* (1), in so far that there was no evidence that the house in which the accused and instruments of gaming were found was used as a common gaming-house, and the two persons who were called as witnesses by the police officers entrusted with the search warrant were headmen of wards appointed under the Lower Burma Towns Act, 1892.

The object of the appeal is to obtain a reconsideration of the above decision. In support of the appeal it has been contended that apart from the question of whether the headmen were persons contemplated by section 103 of the Code of Criminal Procedure as witnesses of a search, the presumption under section 7 of the Gambling Act should be drawn because the house was entered under section 6 of the Act, and the instruments of gaming were found without it being necessary to make any search of the house in the ordinary sense of the word. It was argued that in sub-section (1) of the section a search is distinguished from an entry and in the present case the house was entered under a search warrant and that is sufficient to enable the presumption under section 7 to be drawn. This raises the question of what is the meaning of the words "entered under the provisions of the last preceding section" in section 7 of the Gambling Act.

(1) 3 L.B.R., 229.

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Sub-section (3) of section 6 enacts that all searches under sub-section (1) shall be made in accordance with the provisions of sub-section (3) of section 102, and of section 103 of the Code of Criminal Procedure, 1898. Before entering private property with the object of looking for property in or on it which the person in occupation of the property is not likely to produce voluntarily, a police officer has to obtain a search warrant from an authorised Magistrate. Section 98 of the Code gives certain Magistrates power to issue warrants authorizing police officers above the rank of a constable, first of all, to enter the place to be searched, and then to search it, and to deal with property found in the place. Although these warrants are termed search-warrants for shortness, they convey to the police officer the authority to enter which he would not have without the warrant.

Sub-section (1) of section 103 of the Code enacts that before making a search the officer about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search. No doubt it is not stated in express words that he must call the inhabitants *before he enters* the place, and that he must take them into the place with him, but the only object for which he is authorised to enter being to search the place, witnesses to the search being necessary, it is, I think, clear that he is bound to do so. As stated in *King-Emperor v. Maung Cho* (2) the object of the law could be entirely defeated if it were open to the police to raid a house first, and defer calling witnesses until after they had made the entry and arrests.

We were referred to several authorities upon the construction of Statutes with the view of showing that it is not for Judges to make law, their function being to declare the law. This is an accepted proposition.

The rules for the construction of Statutes are well settled. When the object and intention of the Legislature is plain, the Courts have to give any provision which may be in question its reasonable construction according to the real sense of the language used.

The real sense of the language used in sub-section (1) of section 103 of the Code of Criminal Procedure involves it being obligatory on an officer or person about to execute a search warrant to call upon and get two or more respectable inhabitants of the locality to attend to witness the search before he does his first act under the authority of the warrant in entering the place to be searched. I consequently hold that a place is not entered under the provisions of section 6 of the Gambling Act unless the officer entering is accompanied by two or more respectable inhabitants of the locality.

It is unnecessary to deal with the argument that the instruments of gaming were found without a search. The presumption under section 7 of the Act does not arise unless the place in which instruments of gaming are found has been entered under section 6. The question remains whether the provisions of that section and of sub-section (1) of section 103 of the Criminal Procedure Code were satisfied by the



police officer having taken with him two headmen of wards in the locality to witness the search.

It has been argued that the words "respectable inhabitants of the locality" are not in any way limited by the Legislature, and that it is not for the Courts to limit them. In the abstract the words used include every respectable human being dwelling in the locality, and Mr. McDonnell has argued that the provision would be satisfied by a police officer holding a search warrant taking with him as witnesses two other police officers residing in the locality. This is the logical and necessary conclusion, if the words "respectable inhabitants of the locality" must be construed in their widest sense and without any limitation.

But in view of the subject-matter of the provision, the objects which the Legislature must have had in view, and of the language used when considered in connection with the subject-matter and the objects of the provision, it is clear to me that some limit must be put on the very comprehensive words. If not, the Legislature has made a futile provision in the guise of a provision manifestly designed to ensure fair dealing and a feeling of confidence and security amongst the public in regard to a sometimes necessary invasion of a private right regarded as almost sacred under the British system. One rule for the construction of Statutes is that they must be construed *ut res magis valeat quam pereat*, so that, to use the words of Bowen, L.J., in *Curtis v. Stovin* (3), the intentions of the Legislature may not be treated as vain or left to operate in the air.

As stated in *Rex v. Hall* (4) the meaning of ordinary words, when used in Acts of Parliament, is to be found not so much in a strictly grammatical or etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained. In its legislation with regard to search-warrants the Indian Legislature made provision for the private right of a subject to prevent any and every one from entering on his property being abrogated when necessary in the interests of the public welfare, and it gave power to certain officers of the Government to authorize other Government officers engaged in the prevention, discovery and suppression of crime, and other persons also when necessary, to invade the private right of the individual subject. At the same time, however, it made the provision now in question that whoever was about to act under a search warrant must call two or more respectable inhabitants of the locality to witness the search to be made. To my mind, reading the language used in connection with the subject-matter and the objects which the Legislature must have had in view, the meaning of it is quite clear, and it indicates plainly that the persons who must be called to witness that the Government officer's appointee acts properly and fairly must be chosen from respectable members of the general public, not in any way connected with the Government officer's appointee, or with the carrying out of his duties, so that the invasion of the private right may be attended with as much fairness

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(3) (1889) 22 Q.B.D., 512.

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(4) (1822) 1 B. & C., 123.

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and may convey such sense of fairness as it is possible to secure. The language appears to me to point to the intention being that the selection of witnesses should not be confined to any particular persons or class of persons amongst the respectable inhabitants, but that it should be made from amongst the general body of respectable inhabitants available for the particular occasion on which witnesses may be required, the underlying idea being the same as that which underlies the system of selection of jurors for a trial of an accused, namely, that the persons selected should be absolutely unprejudiced and uninterested in the results of what they have to take part in. If I am right in my view of the meaning of the language used by the Legislature and of its intentions, the giving of the widest construction of the words used, which would admit of two police officers being admissible witnesses to a search, would certainly defeat the objects and intentions of the provision of law in question. In an equal degree would the practice which has grown up in the Town of Rangoon of almost invariably selecting ward headman as witnesses defeat such objects and intention. They are nominees of a Government officer. How can a person whose property is searched and how can the public have implicit confidence that a search has been fairly and properly done by a police officer and that articles said to have been found in a house have really been found there, if the persons called in as witnesses are nominees of another officer and are appointed to assist the police? Headmen appointed under the Lower Burma Towns Act, 1892, have far more extended duties as regards giving information about crime and assisting the police than any ordinary member of the public has. They are part of the establishment provided by Government for the prevention, discovery and suppression of crime. Although their duties in regard to reporting and investigation may not have been extended beyond the offences specified in section 4 of the Act, their position even as regards such offences must bring them into very close connection with the police. A practice of selecting certain members of the respectable public only for witnesses to searches has been reprobated in another province. The practice of confining selections to certain people who are connected with the police and have to assist them is far worse. There is to my mind no way out of the fact that if the words "two or more respectable inhabitants of the locality" are taken in their widest sense, they must include two or more fellow police officers to the police officer entrusted with a search warrant. If they do not include police officers, then it appears to me that the plain objects of the Legislature are not secured, and most important provision of the Legislature may be entirely frustrated. A limit therefore must be put on the words. In putting a limit on them I think that the intentions of the Legislature should be carried out to their fullest extent without a shadow of an attempt to depart from them, however convenient it may be to the authorities to adopt some particular system.

The language in which I expressed my views in *Ah Shee v. King-Emperor* (1) may have been somewhat too wide. Confining myself to the particular question involved in this case I hold that the persons called to witness a search by a police officer or person holding a search

warrant must be respectable inhabitants of the locality in which the place to be searched is situated who do not hold offices to which they have been appointed by a Government Officer, the duties of which include taking part in the prevention or discovery of offences, or in bringing offenders to justice. As the duties of ward headmen include such duties, they are not, in my opinion, such persons as the Legislature contemplated should be called as witnesses to a search under a search warrant.

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Upon this view the house entered in the present case was not entered under the provisions of section 6 of the Burma Gambling Act, and the presumption under section 7 of the Act cannot be drawn.

I would dismiss the appeal.

*Irwin, J.*—By section 6 (1) of the Burma Gambling Act, 1899, the Commissioner of Police is empowered to authorize an officer of police to—

- (a) enter a specified house with such assistance as may be necessary, and by force if necessary ;
- (b) take into custody all persons he may find therein ;
- (c) seize all instruments of gaming, and so forth, found therein ;
- (d) search all parts of the house, and seize all instruments of gaming and so forth found on such search.

I said in *King-Emperor-v. Maung Cho* (2) that I did not think it possible to separate the sub-clauses of this clause (I should have said the clauses of this sub-section) and consider the search as distinct from the entry and arrest for the purpose of section 103 (1) of the Code of Criminal Procedure. The learned counsel for the Crown asks us to say that this dictum is not correct.

Search warrants may be issued under section 96 or section 98 of the Code. If the former stood alone there would be some force in the argument that sub-section (3) of section 6 of the Gambling Act refers only to clause (d) of sub-section (1), and that instruments of gaming may be seized without any search within the meaning of the section, for a warrant under the Gambling Act authorizes the police officer to do many things which he is not authorized to do by a search-warrant under section 96. Moreover, clause (3) is a new provision, which did not exist in Act III of 1867. But section 98 is much wider, and its language is very similar to that of section 6 of the Gambling Act. It does not authorize arrest, and it does not mention seizure of any articles before search, but it expressly authorizes entry, and its provisions about seizure are exactly analogous to those of clause (c) of the sub-section in the Gambling Act. I think it has never been doubted that the entry and the search are one indivisible transaction for the purpose of section 103. If the Burma Legislature had intended to limit the operation of sub-section (3) to searches made under clause (d) of sub-section (1), I think it would have said so expressly. I therefore adhere to the opinion I expressed in 1903.

On the question of the true construction of the words "two or more respectable inhabitants of the locality in which the house to be

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searched is situated." I do not think it is necessary in this case to consider whether two police officers other than the officer conducting the search would be within the terms of the section. My opinion is that a person who is a respectable inhabitant of the locality is none the less a respectable inhabitant of the locality within the meaning of the section if he has been appointed a headman of a ward. If he is not so, because he holds an appointment the duties of which include taking part in the prevention of crime, then the headman of a village is equally outside the terms of the section, for he has exactly the same duties to perform; in respect of detention of crime his duties are rather more onerous than those of his brother in a town. To say that a village headman may not lawfully be called to witness a search under section 103 would be to my mind not only absurd but very detrimental to village administration. If my view of the law is correct it may be that the law does not work so well in towns as in villages. It may be that if the police in any case wish to circumvent the law they can do so more easily in towns than in villages. It may be that the police act injudiciously in selecting ward headmen so often as they do to witness searches. It is possible that the people might have more confidence in the impartiality of the headmen in Rangoon if they were appointed by the Deputy Commissioner instead of the Commissioner of Police. If any of these matters are so, it is no concern of ours in the decision of this case. I do not think we are warranted in importing into section 103 of the Code of Criminal Procedure a proviso that a person who, though not a police officer, holds an appointment by virtue of which he is obliged to assist the police in certain of their duties is not a respectable inhabitant of the locality within the meaning of the section.

The house searched was No. 250, Dalhousie Street, between 23rd and 24th Streets. The two headmen who were called to witness the search lived, one in 23rd Street, and the other in 24th Street. They were inhabitants of the locality. No allegation has been made that they are not respectable. They entered with the police officers. The entry and search, therefore, were in my opinion duly made under section 6. It is not disputed that instruments of gaming were found scattered about the upper room where 11 Chinamen were found. The appellants merely said they knew nothing about it as they were not in the room. Under section 7 I think it must be presumed that the room was a common gaming-house and the persons found in it were there for the purpose of gaming.

As a majority of this bench are of a contrary opinion, it is not necessary for me to discuss the evidence against each respondent in detail.

*Hartnoll, J.*—It is unnecessary for me to set out the facts and points for decision as they have already been set out by the learned Chief Judge, whose judgment I have had the advantage of reading. On the first point I agree with him in considering that a house cannot be deemed to be entered under the provisions of section 6 of the Burma Gambling Act, 1899, unless the police officer authorized by the warrant

be accompanied by two respectable inhabitants of the locality within the meaning of section 103 of the Code of Criminal Procedure.

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There remains the second point for consideration and that is whether headmen of wards appointed under the Lower Burma Towns Act, 1892, by the Commissioner of Police, Rangoon, are inhabitants within the meaning of section 103 of the Code. In interpreting the law Judges must no doubt remember that their object is *jus dicere*, not *jus dare*; but it is a fundamental principle that the intention of the Legislature is to be carried into effect in interpretation, and to arrive at the meaning of words, as was laid down in *Rex v. Hail* (4), the subject, the occasion on which they are used, and the object to be attained must of necessity be taken into consideration. It therefore certainly seems to me that the intention of the Legislature in framing section 103 of the Code of Criminal Procedure should be considered in deciding whether the words "inhabitants" should be taken in its widest and ordinary sense, or whether it should be restricted so as to exclude certain classes of "inhabitants." The intention of the enactment beyond doubt to me seems to have been to ensure that searches are conducted with decency and in order, and that no wrong-doing, such as the planting of articles by the police in the house searched, should take place. The regularity and proper conduct of the search was to be secured by two or more witnesses, and this being so it seems to me to be obvious that the intention was that only those should be chosen as witnesses who can be reasonably relied on to secure the desired result and in whose trustworthiness and ability towards the carrying out of this particular duty required of them confidence can be felt. It follows in my opinion that the intention was to exclude from the category of inhabitants those in whom confidence could not be felt and those against whom a reasonable suspicion arises that they may not carry out the duty required of them. For instance, I consider that it was never the intention of the Legislature that two policemen should be chosen as witness. Since I am of opinion that it was the intention of the Legislature to restrict the meaning of the word "inhabitants" as used in section 103 of the Code, it remains for consideration whether headmen of wards in the city of Rangoon should be excluded. They are appointed by the Commissioner of Police, and it has become the practice to constantly use them as witnesses of searches. To give an instance, in *Mi Hauk v. King-Emperor* (5) one headman during the last year witnessed searches some 8, 9, or 10 times with one excise officer. They further have certain police duties to do. They may be good and respectable men, and I would lay stress on the fact that I lay no imputations against their respectability and good faith, but under the circumstances I am of opinion that it would be dangerous to hold that they are of the class of those whom the law intended to be called as witnesses of searches. Where they have police duties, are constantly being called on to attend searches, and are appointed by the police, it seems to me that there cannot be that confidence in their doing the duty required of them that there should be, and that they

(5) 4 L.B.R., 121.

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become of that class that the law never intended witnesses to be chosen from.

I would therefore hold that the house entered in the present case was not entered under the provisions of section 6 of the Burma Gambling Act and the presumption under section 7 of the Act cannot be drawn. I would dismiss the appeal.

### Full Bench—(Civil Reference).

Civil Reference No. 7  
of 1907.  
January 6th,  
1908.

Before Sir Charles Fox, Chief Judge, Mr. Justice Irwin, C.S.I.,  
and Mr. Justice Hartnoll.

### THE RANGOON ELECTRIC TRAMWAY AND SUPPLY COMPANY, LIMITED v. THE RANGOON MUNICIPAL COMMITTEE.

Giles—for plaintiff. | Eddis—for respondent.

*Taxable lands—Tram-lines laid in street—Occupier of land—Burma Municipal Act, 1898, ss. 46 (1) (A) (a), 64 (5) (7).*

Land in which tram lines are laid, although in a street, is land within the meaning of section 46 (1) (A) (a) of the Burma Municipal Act.

A company owning tram-lines is in occupation of the land in which they are laid within the meaning of sections 68 and 69 of the same Act.

*Pimlico Tramway Company v. The Greenwich Union*, (1873) L.R. 9 Q.B. 9, *Melbourne Tramway and Omnibus Company v. Mayor, etc., of the City of Fitzroy*, (1900) L.R., A.C., 153 (1901 Vol.) followed.

Fox, C.J.—The following questions have been referred to this Court by the Judge of the Court of Small Causes, Rangoon, under sub-section (5) of section 64 of the Burma Municipal Act, 1898:—

1. Are the Montgomery Street Tram Lines "Buildings and Lands" within the meaning of section 46 (1) (A) (a) of the Burma Municipal Act?
2. Are the Montgomery Street Tram Lines in the occupation of the owners of the lines within the meaning of sections 47 and 48 of the same Act?

A difficulty in answering the questions presented itself at the outset in the fact that it was not stated what was meant by the word "Tram Lines."

The advocate for the Municipal Committee has, however, stated at the hearing of the reference that what has been assessed is the land on or in which the appellant company's property has been laid. This may be accepted to be the case and, being so, there can be no doubt the such land is land within the meaning of section 46 (1) (A) (a) of the Act. The first question, however, appears to assume, and it has been argued on behalf of the appellant company, that the words "buildings and lands" in the clause must be read conjunctively, and that they virtually mean lands covered with buildings. The natural meaning of the language used in the section is that a committee may impose tax on buildings, and they may impose a tax on lands, not exceeding ten per centum of the annual value of such buildings and lands. There is no sufficient reason for thinking that the words should be read in any other sense. The language used with respect to other

alternative taxes does not support the construction contended for by appellants. The answer I would give to the first question is that the Tram Lines, meaning thereby the land of the street in or on which the appellant company's sleepers and rails are laid, is land within the meaning of clause (a) of division (A) of sub-section (1) of section 46 of the Burma Municipal Act.

The second question as put is meaningless, but it may be taken that the learned Judge had in mind section 68 and section 69 of the Act, and by mistake wrote sections 47 and 48. It has been argued for the appellant company that it is not an occupier of the land in which the rails and sleepers have been laid by it, and that it does not even own such rails and sleepers. The question put by the Judge assumes that the company still own what it laid in the street, and for the purpose of answering the question we must assume that it does, because the Judge's decision on this point is final under sub-section (7) of section 64.

It is contended that the company as a mere user of the road, and not having exclusive occupation, it cannot be said to occupy the land. The same argument was used in the case of the *Pimlico Tramway Company v. The Greenwich Union* (1), but did not prevail. In the case of that company, and in the case of the appellant company, a tramway was laid in the roadway under authority in such a way that a carriage with wheels having a flange going into a groove or space might be run on it with facility. Three eminent Judges had no doubt the Tramway Company were occupiers of the portion of land upon which they laid the tram rails.

The decision was accepted as correct by their Lordships of the Privy Council in the *Melbourne Tramway and Omnibus Company v. Mayor, etc., of the City of Fitzroy* (2). In the face of such weighty pronouncement as to what constitutes occupation of land by a Tramway Company it is impossible to accede to the argument put forward on behalf of the appellant company.

I would answer the second question referred in the affirmative.

*Irwin, J.*—I concur.

*Hartnoll, J.*—I concur.

Before Mr Justice Hartnoll.

A. L. A. R. LAKSHMANAN CHETTY v. V. R. P. P. L.  
VELLAYAPPA CHETTY.

*Chari*—for applicant (defendant). | *Kyaw Din*—for respondent (plaintiff).

*Ground for setting aside dismissal of suit for default—Reason for non-appearance of plaintiff—Difficulty in procuring attendance of witnesses—Civil Procedure Code, s. 103.*

The only ground on which the dismissal of a suit for default can be set aside under section 103 of the Code of Civil Procedure is that the plaintiff was prevented by sufficient cause from appearing.

The respondent brought a suit against the applicant and two others to recover Rs. 3,000, and on the 29th November 1906 it was dismissed

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ELECTRIC  
TRAMWAY  
AND SUPPLY  
COMPANY,  
LIMITED  
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THE  
RANGOON  
MUNICIPAL  
COMMITTEE.

Civil  
Revision  
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1908.

(1) (1873) L.R. 9. Q.B., | (2) (1900) L.R., A.C., 153 (1901 Vol.).



1908.  
A.L.A.R.  
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MAYAPPA  
CHETTY.

for default with costs. On the 11th December he applied to have the order of dismissal set aside under section 103 of the Civil Procedure Code. The lower Court held an enquiry and found that he had not given sufficient cause to account for his non-appearance on the 29th November, and in this finding I agree after a perusal of the evidence. The Court then proceeded to set aside the order on the ground that it was difficult to procure the attendance of the witnesses. Against this order setting aside the order of dismissal this application is made on the ground that the only ground on which an order of dismissal can be set aside in pursuance of the law as laid down in section 103 of the Code is that of being prevented by any sufficient cause from appearing when the suit was called on for hearing. This seems to be the case, and the lower Court appears to have omitted to notice the point.

As the respondent did not prove that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, it seems to me that the order setting aside the order of dismissal was wrong, and I accordingly set it aside, with the result that the suit stands dismissed with costs. I allowed the applicant his costs in the application to set aside the order of dismissal in the lower Court, and I also allow him his costs—two gold mohurs—in the present application to this Court.

Before Mr. Justice Hartnoll.

Civil Appeal  
No. 35 of  
1907.

SHWE LOK AND MA NYEIN AUNG v. MA SEIK KAUNG.

R. S. Dantra—for appellants (defendants).

N. M. Cowasjee—for respondent (plaintiff).

January 6th,  
1908.

Usufructuary mortgage—Temporary sale with possession as security for debt—  
Suit for sale—Application of principles of Transfer of Property Act—  
Transfer of Property Act, ss. 58, 67, 68.

A and B borrowed a sum of money from C, and as security sold certain land temporarily to C, whom they put in possession but who rented the land to them.

In a subsequent year they entered on and cultivated the land without C's consent, whereupon C sued them for ejectment and possession, with damages, or in the alternative for a decree for the amount of the loan with damages and for sale of the land in default of payment.

*Held*,—that the original transaction came within the definition of usufructuary mortgage in section 58 (d) of the Transfer of Property Act; that though the Act was not in force its provisions might well be considered; and that, following the provisions of section 67, C was not entitled to a decree for sale. A decree was given for the ejectment of A and B, for putting C in possession, and for the payment of damages.

*Unda v. Umrao Begam*, (1888) I.L.R. 11 All., 367; *Luchmishar Singh v. Dookh Mochan Jha*, (1897) I.L.R. 24 Cal., 677; *Chathu v. Kunjan*, (1888) I.L.R. 12 Mad., 109: referred to.

Maung Shwe Lok and Ma Nyein Aung were sued by Ma Seik Kaung under the following circumstances. The latter alleges that on the 4th *labyigyaw* of Thadingyut 1264 B.E. Maung Shwe Lok and Ma Nyein Aung borrowed Rs. 1,200 from her, and temporarily sold certain land to her with a promise to retake it on payment of the consideration money, that they put her in possession and she rented

out the land to them for 400 baskets of paddy per year. She then goes on to allege that Maung Shwe Lok and Ma Nyein Aung subsequently created a further charge on the land of Rs. 600 which was to be added to the Rs. 1,200 and that in 1267 B.E. the defendants forcibly entered the land without her consent and were in wrongful possession and working it, in consequence of which she has sustained a loss of Rs. 280. She therefore prayed for a decree for ejectment and for possession, with a further decree for the recovery of Rs. 280 damages from them, or that in the alternative a decree for recovery of Rs. 2,080 be passed against them to be paid within a time to be fixed by the Court and that in default the land be sold and proceeds applied in and towards the satisfaction of the amount decreed, and that in case of any deficiency the defendants may by ordered to pay the same.

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The defendants disputed the claim, but the Subdivisional Court found the facts as stated by the plaintiff and gave a decree as asked for in alternative, except that it was not ordered that the defendants should be liable for any deficiency after the sale. The defendants appealed to the Divisional Court, which altered the decree of the Subdivisional Court by giving a simple money decree for Rs. 280 and a mortgage decree for the balance, Rs. 1,800. Against this decree the defendants lay a further appeal. The first ground is that the lower Courts erred in holding that Rs. 600 was a further charge on the mortgaged premises. It is urged that, as this was a verbal arrangement, no evidence of it could be given in accordance with the provisions of section 92 of the Evidence Act. I am unable to see that any deed was drawn out with respect to the first transaction. A report was made to the revenue surveyor, written down and signed as usual; but this report to my mind is not such a writing as is contemplated by section 92 of the Evidence Act. It was further argued that the first transaction being a usufructuary mortgage a further charge could not be made. No authority was quoted to support this view and I fail to see why the intention of the parties should not be given effect to. It is not denied that the Rs. 600 are due, and it is clear that they were charged on the property. The ground must fail. My remarks above also dispose of the second ground. The third ground was that a decree for sale could not be made. From a perusal of the record it certainly seems to me that the transaction before the revenue surveyor was a usufructuary mortgage. Possession was transferred for the debt due until it was repaid, and then the land was let out to the defendants. The transaction seems to come within the definition of usufructuary mortgage as given in section 58 (d) of the Transfer of Property Act. The subsequent charge of Rs. 600 was to be added as liability on the land when the mortgage was redeemed, according to witness Maung Shwe Nge, whom there is no reason to disbelieve. It would appear that the intention was merely to increase the mortgage money to Rs. 1,800. Nothing was said about the land being sold, if it was not paid. It seems to me merely to extend the usufructuary mortgage money to Rs. 1,800. The point remains as to whether a

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decree for sale should have been given. According to the arrangement between the parties nothing was said as to any sale. Though the sections of the Transfer of Property Act applicable were not in force where the land is situated, they may well be considered. They are in sections 67 and 68 of that Act. Section 67 lays down that nothing in the section shall be deemed to authorize a usufructuary mortgagee, as such, to institute a suit for foreclosure or sale, and unless section 68 of the Act applies, it seems to me that Ma Seik Kaung should not be given a decree for sale. The view is not without authority, and I would quote the cases of *Umda v. Umrao Begam* (1), *Luchmeshar Singh v. Dookh Mochan Jha* (2), and *Chathu v. Kunjan* (3). The next point that arises is whether the principle laid down in section 68 is applicable. It should be noticed that that section authorizes the suing of a mortgagor for the mortgage-money, and has nothing to do with the sale of mortgaged land. Clause (b) of the section deals with the deprivation of his security by the mortgagor. Here the security exists but the mortgagors are in wrongful possession. I am unable to hold that the principle in section 68 applies. It seems to me that a decree for sale should not have been given, and that the first relief asked for should have been decreed. The fourth ground of appeal was dropped. I set aside the decree of the Divisional Court and decree that Maung Shwe Lok and Ma Nyein Aung be ejected from the land in suit and that Ma Seik Kaung be put into possession of it, and further that on account of damages Maung Shwe Lok and Ma Nyein Aung do pay Rs. 280 as damages to Ma Seik Kaung. Under the circumstances each party will pay their own costs in all Courts.

Special Civil  
2nd Appeal  
No. 99 of  
1907.

January 6th,  
1908.

Before Mr. Justice Hartnoll.

H. McDONALD v. C. B. WILLIS.

*Lentaigne*—for appellant (defendant). | Respondent (plaintiff) in person.

*Claim for rent subsequent to contract of sale—Contract of sale of incumbered property—Duty of seller to discharge incumbrances—Retention of purchase-money against incumbrances—Application of principles of Transfer of Property Act—Transfer of Property Act, 1882, s. 55 (1) (g) and 5 (b).*

A rented and occupied a house owned by B at Thayetmyo. B agreed to sell the house to A free of incumbrances for Rs. 2,000. Rupees 100 was paid by A as earnest-money, and the balance was to be paid on execution of the deed of sale. There were certain mortgages on the house, amounting to more than Rs. 1,900. B failed to clear these off, and the balance of the purchase-money remained unpaid. At the end of nearly two years, B sued A for rent from the time of the contract of sale, although no agreement was made that rent should be so payable.

*Held*,—that although section 55 of the Transfer of Property Act was not in force at Thayetmyo, its general principles should be applied; that therefore, as the house was sold free from incumbrances, it was B's duty to discharge the mortgages, and that as he failed to do this, A was entitled to retain the amount due on them out of the purchase-money; and consequently that B himself was responsible for the non-payment of the purchase-money, and could not claim rent.

(1) (1888) I. L. R. 11 All., 367. | (2) (1897) I. L. R. 24 Cal., 677.  
(3) (1888) I. L. R. 12 Mad., 109.

C. B. Willis sued H. McDonald to recover Rs. 1,140 house-rent. The plaint sets out that McDonald rented the house of Willis at Thayetmyo for Rs. 30 a month and that rent was paid up to the 15th March 1905, and that since then up to the 15th May 1906 no rent was paid. So that Rs. 420 are due for this period. McDonald asked Willis to sell his house for Rs. 2,000, undertaking to give in cash Rs. 100 as earnest-money and the balance Rs. 1,900 within one month, and agreeing to this Willis accepted the Rs. 100 earnest-money, but the defendant did not pay the balance Rs. 1,900 within one month. In March 1906, McDonald was served with a notice to buy the house within five days and that after that the earnest-money would be forfeited. Subsequently a notice was sent to the effect that the earnest-money was forfeited and that the house must be vacated within a month or that house-rent must be paid at the rate of Rs. 120 a month beginning from the 15th May 1906. The defendant did not quit the house, and so rent is asked for up to the 15th December 1906 at the enhanced rate.

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The defence story is as follows. On the 15th March 1905, McDonald bought the house for Rs. 2,000, paying Rs. 100 earnest-money. It was understood by defendant that there was then one mortgage on the house which plaintiff agreed to redeem within one month, and then the house and land was to be transferred to McDonald for Rs. 1,900, that the mortgage was not redeemed as agreed on, that no rent was to be paid from the 15th March 1905. that subsequently McDonald came to know there was another mortgage on the property still outstanding though he was falsely told that it had been paid off, that defendant has always been ready to carry out his part, but that Willis has not carried out his part that no rent is due.

The Court of first instance held that Willis was to blame in not settling up the mortgages on the house and so for the balance of the purchase-money not being settled, and so refused to allow the claim for rent for the first fourteen months claimed. As regards the second six months the Court held that the defendant should have seen to the performance of the contract, and as he acted contrary to the letter sent him by the plaintiff requesting him to quit, he was liable for the rent at Rs. 120 a month. A decree was passed accordingly.

On appeal to the Divisional Court that Court gave a decree for the whole amount claimed. It held that there was no concealment of the second mortgage, that it was proved that defendant was to pay Rs. 1,900 to the mortgagee towards the first mortgage and plaintiff was to pay off the balance of this and the whole of the second mortgage, but that it was not clear whether the plaintiff should make these payments before defendant paid the Rs. 1,900. It also held that as regards the agreement that no rent should be paid it could not be separated from the purchase agreement as a whole, that it is admitted the purchase should be completed within a month and so the agreement was not binding after the first month, and as the agreement was entirely subsidiary to and dependent on the purchase

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agreement if the latter fails the former must fail also. It held that it was not necessary to decide who was to blame for the non-completion of the purchase, and that it is sufficient that the agreement has not been carried out and that therefore all parts fail equally, including the agreement not to take rent.

A further appeal has therefore been laid against this decision.

The first point for consideration is, what was the agreement entered into by the parties with regard to the sale of the house, and secondly what are the legal incidents of this agreement. The contract of sale was produced. It is to this effect: "Received from H. McDonald the sum of Rs. 100 being earnest-money on account of the sale of my house and land at Thayetmyo at present occupied by him. Sold to him this day for Rs. 2,000. The balance of Rs. 1,900 to be paid when the deed of sale is drawn up." I am unable to see that it was admitted that the purchase should be completed within a month. The plaintiff's story is that defendant agreed to pay the balance Rs. 1,900 within a month; the defendant's story is that the plaintiff agreed to redeem the outstanding mortgage within a month and transfer the house and land for the balance Rs. 1,900. The plaintiff puts a duty on the defendant towards the completion; the defendant puts a duty on the plaintiff. Whether the plaintiff deceived the defendant as to the second mortgage seems to me to be immaterial, as from his letters of the 16th May 1905, and also of the 26th March 1906, it is clear that he held himself to be responsible for the mortgages, and that therefore the property was sold free of incumbrances. I also see no reason to doubt the evidence of the Chetty Mutu Verappa on the point. It also seems to me to be clear from the circumstances of the sale, the Chetty's evidence and the fact that since the sale McDonald has been paying the taxes, there was no agreement for the payment of rent after the contract of sale. The agreement seems to me to have been clearly one that after the agreement McDonald was to remain in possession as purchaser and owner, and that all that remained was to clear the incumbrances and execute the conveyance of sale. As I hold it proved that the plaintiff sold the property free of incumbrances, and bound himself to clear them off, it seems to me that, as he has not done so up to date, he cannot now make any claim for rent or damages. Though section 55 of the Transfer of Property Act is not in force in Thayetmyo, it seems to me that its general principles should be applied in dealing with this case. By sub-section (1) (g) of that section the plaintiff was bound to discharge the incumbrances, and by sub-section (5) (b) the defendant could retain out of the purchase-money the amount of any incumbrances on the property existing at the time of the sale for payment to the persons entitled thereto. It seems to me that as the plaintiff did not clear off the incumbrances as he should have done he cannot now hold the defendant liable for rent or damages for wrongful possession. It was not in his power to cancel the contract of sale in and after March 1906, when he had not carried out his duty of freeing the property of the incumbrances then existing on it; nor was the

defendant bound to accept an indemnity against the mortgagees, which might or might not have proved worthless in whole or in part. The defendant seems to have been all along in possession as agreed on, and was waiting for the plaintiff to clear all incumbrances; in that the plaintiff failed to do so, I am unable to see how he can now claim any rent. There appears at the present moment to be an incumbrance on the property amounting to more than Rs. 1,900. If defendant had given the plaintiff the Rs. 1,900 he might have, to save the property, to himself clear this incumbrance, and in that case would be wrongfully out of pocket to the amount so paid.

I accordingly allow this appeal, set aside the decree of the Divisional Court, and dismiss the suit with costs in all Courts.

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H. MC  
DONALD  
v.  
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Before Mr. Justice Irwin, C.S.I.

PO HLA v. KING-EMPEROR.

Christopher—for applicant.

Seizure of moneys in common gaming-house—Entry—Forfeiture—Burma  
Gambling Act, 1899, ss. 6, 11, 12, 15.

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There is no provision in the Burma Gambling Act empowering any person to seize moneys found in a common gaming-house which is not entered under the provisions of section 6, nor authorizing a Magistrate to order that moneys so seized shall be forfeited.

*Ah Shee v. King-Emperor*, 3 L.B.R., 229, referred to.

The Township Magistrate, on receiving information that the house of Kyi Min was used as a common gaming-house, entered it with the headman and some other person, when some of the gamblers jumped out of the window, while others remained, and put in their pockets the moneys which were in front of them in the gambling circle. The Magistrate ordered them to put down in front of them the moneys they had picked up, and they did so. The moneys were then seized by order of the Magistrate and counted by the headman. The total amount was Rs. 702-6-6.

Some instruments of gaming were also found, but the Subdivisional Magistrate who tried the case held that the search was not properly conducted, and that therefore no inference under section 7 of the Burma Gambling Act could be drawn from the fact of finding instruments of gaming. He referred to the ruling in *Ah Shee v. King-Emperor* (1), but he did not give any reason for holding that the search was not properly conducted, nor did he expressly say that the house was not entered under the provisions of section 6. He held that the ruling abovementioned was not fully applicable to the case, because there was direct evidence of gambling both with *anidaung* and cards, and that two *daings* collected commission. On this evidence he convicted two persons under section 12, and eight persons under section 11, and inflicted fines. The judgment ends with these words, "The things seized will be confiscated. The gambling

(1) 3 L.B.R., 229.

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instruments shall be destroyed, and the cash forfeited to the Government."

Po Hla, who was one of the persons convicted under section 12, has petitioned this Court to set aside the conviction, and to direct that the moneys found in his pocket may be returned to him. I declined to entertain the application so far as it referred to the conviction, and the only question for consideration is whether the order directing that the cash be forfeited to Government is justified. Although it is not clear why the Magistrate considered that section 7 did not apply to the case, I think it must be accepted that that was so, and that the house was not entered under the provisions of section 6.

Section 6 empowers certain Magistrates under certain conditions to enter a house, and seize all moneys and articles of value, reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein. Section 15 enacts that on the conviction of any person for an offence under section 11 or 12 committed in any common gaming-house entered under the provisions of section 6, the convicting Magistrate may order all moneys seized therein to be forfeited. There is no provision in the Act empowering any person to seize moneys found in a common gaming-house which is not entered under the provisions of section 6, nor authorizing the Magistrate to order that moneys so seized be forfeited.

In the present case, then, both the seizure of the money and the order directing it to be forfeited are illegal. I therefore set aside that order, and direct that all the moneys be returned to the persons from whom they were taken. The list of things seized does not show how much was taken from each person, but the details are given in the evidence of the Township Magistrate.

Before Mr. Justice Hartnoll.

MA SEIN U v. A. L. V. R. R. M. LETCHMANAN CHETTY.

Civil 2nd  
Appeal  
No. 24 of  
1907.

January 9th,  
1908.

*Fagan*—for appellant (plaintiff). | *V. N. Sivaya*—for respondent (defendant).  
*Claim to attached property—Fraudulent transfer—Fictitious sale—Burden of proof—Possession at the time of attachment—Civil Procedure Code, s. 283.*

Certain immoveable property was attached by A in execution of a decree against B. C, the daughter of B, instituted a suit to establish her right to the property alleging that she had brought it from B. She failed to show that she had been in possession at the time of the attachment.

*Held*,—that the burden of proving her right to the property lay upon C.

*Kadappa Chetty v. Shwe Bo*, 2 L.B.R., 152, distinguished.

*Govind Aitmaram v. Santai*, (1887) I.L.R. 12 Bom., 270, followed.

Ma Sein U brought a suit under section 283 of the Code of Civil Procedure to establish her right to a house and a house site, alleging that she had purchased it from her mother, who was the judgment-debtor of the defendant, Letchmanan Chetty. The defendant pleaded that the sale was a fictitious one, and that the mother—his judgment-debtor—was in possession. Both the lower Courts have dismissed the suit on the ground that the sale alleged appears to be collusive and



fictitious, or at any rate that it was not proved to be genuine. Against this decision this second appeal has been laid, and it is urged that the burden of proof has been wrongly thrown on appellant. The question of burden of proof does not seem to have received much attention in the lower Courts. It is not even mentioned in the ground of appeal in the first Appellate Court. The case of *Kadappa Chetty v. Shwe Bo* (1) is relied on as throwing the burden of proof on the defendant in the present case. The point in that case was that the plaintiff proved possession by him at the time of the attachment, and it was held that that fact threw the burden of proof on the defendant to prove his right to attach. Here in this case the question of whether Ma Sein U was in possession at the time of the attachment has not been gone into with a view to see on which side lies the burden of proof. I have perused the record, and am of opinion that Ma Sein U has not proved that she was in possession of the house and site at the time of the attachment. The mere fact that she has a conveyance of the property will not prove actual possession, as it may be a fraudulent one. Her application under section 278 was dismissed, and as it seems to me that she has not shown that she was in possession at the time of the attachment, I am of opinion that the burden of proof lies on her to establish her right to the property. The present case seems to be similar in nature to that of *Govind Atmaram v. Santai* (2).

Holding as I do that the burden of proof lies on Ma Sein U, I see no reason for interference. Both the lower Courts came to the conclusion that she had not shown the transaction to be a *bonâ fide* one and that finding is final.

I accordingly dismiss the appeal with costs.

Before Mr. Justice Irwin, C.S.I.

TUN HLA v. SHWE NGO.

Sealy—for respondent.

*Order for disposal of property—Im moveable property—Inquiry or trial—Proceedings when trial barred as resjudicata—Criminal Procedure Code, 1898, ss. 403, 517.*

In section 517 of the Code of Criminal Procedure, the words "property regarding which any offence appears to have been committed" include immoveable property.

Where an accused person was acquitted of criminal trespass on the ground that the trial was barred by section 403 of the Code of Criminal Procedure.

*Held*,—that the proceedings in connection with such acquittal did not constitute an inquiry or trial within the meaning of section 517, and that therefore no order for the disposal of the property in respect of which the trespass was alleged could be passed at the conclusion of such proceedings.

Tun Hla and Satappa Chetti were prosecuted for criminal trespass. The District Magistrate found that both the accused had committed that offence, but he could not convict them because they had been previously acquitted of the same offence by the Subdivisional Magistrate in case No. 161 of 1907. That is a most extraordinary finding, for the acquittal in case No. 161 is dated 31st July 1907.

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January  
14th.  
1908.

(1) 2 L.B.R., 152.

(2) (1887) I.L.R. 12 Bom., 270.

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while in the present case the date on which the offence is alleged to have been committed is 7th September 1907.

However, that is not the point now under consideration. The District Magistrate at the end of the judgment made this order, "But I direct that Shwe Ngo" (complainant) "in whose possession the land legally was and is, do remain in possession of such land. Any molestation of him in his possession of the land will from date be duly punishable."

Tun Hla applied to the Sessions Judge for revision of this order on the ground that it is *ultra vires* because he was not convicted. The Sessions Judge has reported the case for orders, expressing the opinion that it is not an order under section 145 of the Code of Criminal Procedure, and that it cannot be justified by any other section of the Code.

The learned advocate who appeared for Shwe Ngo can only suggest that the order may have been made under section 517. The word "property" in that section is not expressly limited to moveable property, but no case has been found in which the section was held to apply to immoveable property. The question does not seem to have been raised.

The word "property" is not defined, either in General Clauses Act or in the Code of Criminal Procedure. The only part of section 517 which could under any construction apply to immoveable property is, I think, that which relates to "property regarding which any offence appears to have been committed." The explanation to the section throws some light on this. Suppose that a person who buys a house cheats by paying for it with counterfeit coins, and then after getting possession of it sells it to a third party, and the offender is then arrested with the sale-proceeds in his possession. The explanation to section 517 would apparently authorize the Magistrate to make an order for the disposal of the sale-proceeds of the house, because the house was property regarding which the offence of cheating had been committed. If that be so, I think it necessarily follows that the Magistrate could make a like order for the disposal of the house itself, at any rate if the offender had not sold it but retained it in his own possession. For this reason, as well as because the word "moveable" is not in the section, I am of opinion that the words in section 517, "property regarding which any offence appears to have been committed" include immoveable property.

There remains the question whether the section empowers the Magistrate to make such an order for the disposal of the land when he find that an offence regarding the land has been committed, but acquits the accused by reason of the provisions of section 403 of the Code of Criminal Procedure. It is clear that the Magistrate's power to make the order does not depend on his convicting the accused. If he acquits the accused, believing him to be probably guilty though not proved so, or believing that the offence was committed by some other person, he can make an order for disposal of the property. But when a previous acquittal is pleaded, and the fact of the previous

acquittal is established, the Court is precluded from enquiring into the facts at all, except to ascertain whether the facts alleged are the same as were alleged in the previous trial. Section 403 does not enact that the accused shall be acquitted, but that he shall not be liable to be tried. Now section 517 begins with the words, "when an inquiry or trial in any Criminal Court is concluded." Can these words apply to a case in which the Court is prohibited by section 403 from conducting a trial on the merits at all? If they do, the result would seem to be that a complainant might institute a second prosecution which would be barred by section 403, and yet it might result in an order being made for disposal of property, possibly contradictory to a like order made at the previous trial; and such subsequent order might be made without a full enquiry into the facts. In my opinion section 517 does not apply to a case in which the trial is barred by section 403 of the Code of Criminal Procedure.

It is true that in the present case the accused did not plead the previous acquittal, and the Magistrate's finding that the previous acquittal was a bar appears to be entirely wrong. Nevertheless I do not see how I can apply a different rule from that which I should apply if the previous conviction had really been a bar. On the ground that the accused were found to have been previously acquitted I find the order for Shwe Ngo to remain in possession was made without jurisdiction, and I set it aside.

My order, however, must not be taken as a license to Tun Hla or to Satappa Chetti to enter on the land. The District Magistrate's order is in substance less of an order for disposal of the land than a warning to the accused. I express no opinion on its propriety as a warning. It may be a very salutary one, and if the accused disregard it they will do so at their own proper peril.

Before Mr. Justice Irwin, C.S.I.

PO GAUNG AND 2 OTHERS v. MA SHWE BWIN AND 4 OTHERS.

*Agabeg and Villa*—for appellants (defendants).

*Fagan*—for respondents (plaintiffs).

*Proof of entries in Land Records Register IX—Pyatbaing—Proof of admission—Indian Evidence Act, 1872, ss. 21, 35.*

An entry in Land Records Register IX regarding the transfer of land may be proved, under section 35 of the Evidence Act, by the person who made it if it contains a statement of a fact in issue or relevant fact. But admissions evidenced by such entries, although relevant as against the person making them, cannot be proved on behalf of the person making them except as provided by section 21 of the Evidence Act.

*Maung Cheik v. Tha Hmat*. 1 L.B.R., 260, referred to.

The plaintiffs-respondents Ma Shwe Bwin and Ma Ngwe Yon are daughters-in-law of appellant Po Gaung. Their husbands, Tun Gyaw and Kya Gaing, died in 1262 and 1265 respectively. The other plaintiffs are children of Ma Shwe Bwin and Ma Ngwe Yon. They

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TUN HLA  
v.  
SHWE NGO

Special Civil  
2nd Appeal  
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1906.

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23rd, 1908.

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—  
 Po GAUNG  
 v.  
 MA SHWE  
 BWIN.  
 —

were wrongly joined as plaintiffs ; they have no rights to possession of inherited property during the lifetime of their mothers.

Plaintiff's case is that Po. Gaung gave his paddy land to his sons Tun Gyaw and Kya Gaing in Kasôn 1261, and transferred it to their names in the revenue register in the autumn of the same year, namely, on 16th October 1899.

The Court of first instance found the gift not proved. The Court of first appeal found it proved, and gave plaintiffs a decree for declaration and possession of the land, with a condition which was not asked for.

What plaintiffs had to prove was a gift made in Kasôn 1261. They never alleged that the gift was effected by the report to the thugyi and such a report obviously could not effect the gift. The Divisional Judge treated the case as if the gift were made by the report to the thugyi. He also speaks about the thugyi transferring possession of the land, which of course he never attempted to do.

In questioning the correctness of a ruling of this Court,\* the Divisional Judge permitted himself an unbecoming degree of license. His duty is to follow the rulings of this Court, not to criticize them. Moreover, he calls the exhibits F, G, H, and K, *pyatbaings*, which they are not. Neither are they copies of *pyatbaings*. The *pyatbaing*, as its name implies, is the foil cut out of Register IX and given to the person reporting. The exhibits are copies of the counterfoils which remain in the register. The learned Judge admitted them under section 157, Evidence Act, because the thugyi who made them was called as a witness. Doubtless when a thugyi or revenue surveyor is examined, he may be asked to prove that he made entries in the ordinary course of his duty in Revenue Register IX, and those entries may be put in evidence, under section 35, Evidence Act, provided the entry is a statement of a fact in issue or relevant fact. If the purport of the entry be that the defendant reported that he had given the land to the plaintiff, then the thugyi who wrote the entry can prove it at the instance of the plaintiff. But if the purport of the entry be that the plaintiff came and said that defendant had given the land to him, the entry is not admissible on behalf of the plaintiff, being barred by section 21. In the present case the entry is that Po Gaung sent his sons with a letter declaring his wishes. The entry could be proved with the letter, but not without it.

The entries, however, need not have been put in evidence at all, as the facts which they recorded were expressly admitted in the written statement. Anything contained in these entries which is outside the allegations in the plaint certainly does not help the plaintiffs case.

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\* *Maung Cheik v. Tha Hmat*, 1 L.B.R., 260.

Before Mr. Justice Irwin, C.S.I.

TUN WIN AND PO PYAN v. KING-EMPEROR.

Parrott and Hamlyn—for appellants.

*Power of Sessions Judge in revision—Further inquiry—Specifying class of Magistrate to hold further inquiry—Reasons for ordering further inquiry—Criminal Procedure Code, 1898, s. 437.*

Criminal  
Appeal  
No. 2 of  
1908.

January  
24th  
1908.

The Sessions Judge acting under section 437 of the Code of Criminal Procedure directed the District Magistrate, by himself or by a Special Power Magistrate subordinate to him, to hold further inquiry in the case of an accused person who had been discharged by a Township Magistrate. The accused was subsequently convicted by the Senior Magistrate, and on appeal it was contended that the Sessions Judge should not have ordered further inquiry by a Magistrate other than the Magistrate who had discharged the accused.

*Held*,—that the Sessions Judge's order was legal and proper one.

It was further contended that the Sessions Judge had not given reasons for his order. The words used by him were: "I have translated and considered the whole of the evidence on the record, and the conclusion to which I have come is that there must be further inquiry."

*Held*,—that these words showed ample reasons for the order, and that it would have been improper for the Sessions Judge to comment on the evidence in detail.

*Queen-Empress v. Amir Khan*, (1885) I.L.R. 8 Mad., 336; *Chundi Churn Bhutacharjea v. Hem Chunder Banerjea*, (1883) I.L.R. 10 Cal., 207; *King-Emperor v. Po Yin*, 3 L.B.R., 97; referred to.

*Nagendra Nath Sen v. Korb*, 8 C.W.N., 456, distinguished.

This case first came before the Township Magistrate of Thônghwa, who, after recording all the evidence and examining the accused, discharged them under section 209 of the Code of Criminal Procedure.

The complainant applied to the Sessions Judge, who directed the District Magistrate by himself or by a Special Power Magistrate subordinate to him to make further inquiry into the case. This was done by Mr. Pratt, a Magistrate empowered under section 30 of the Code of Criminal Procedure, who convicted the accused.

Appellants' advocate submits that the Sessions Judge's order is bad, because (a) it directs the further inquiry to be made by a Magistrate other than the Magistrate who discharged the accused, and (b) the Sessions Judge did not give reasons.

On the first point he cites *Queen-Empress v. Amir Khan* (1) and *Chundi Churn Bhutacharjea v. Hem Chunder Banerjea* (2). In both those cases the main point in issue was a different one, on which this Court has dissented from them in *King-Emperor v. Po Yin* (3). On the point now in question the Madras ruling does not help the appellant. The learned Judges said:

We are not prepared to say that in no case is it competent to the District Magistrate to transfer the case to another Magistrate when he acts under section 437.

In the Calcutta case it was held that the Sessions Judge has not, under section 437, the power of directing a particular subordinate Magistrate by name to make the further inquiry, because the words

(1) (1885) I.L.R. 8 Mad., 336. (2) (1883) I.L.R. 10 Cal., 207.  
(3) L.B.R., 97.

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TUN WIN  
v.  
KING-  
EMPEROR.

of the section were that the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make further inquiry. There is no need to question the correctness of that ruling. The Sessions Judge used the exact words of the section: the only limitation he made was that the further inquiry must be made by a Magistrate with special powers. He did this because, having formed an opinion on the evidence, he considered it undesirable that the case should be committed to the Court of Session. In my opinion the limitation was not contrary to law, and was in no way improper.

On the other point the learned advocate relies on *Nagendra Nath Sen v. Korb* (4), in which the Sessions Judge said:

I have heard learned counsel on both sides at great length. I am of opinion that it is in the interest of all concerned that there should be a further inquiry into the charge.

The learned Judges held that this order did not state any proper grounds for directing a further inquiry, and therefore they set it aside, intimating at the same time that it was quite open to the complainant to ask the Deputy Commissioner (District Magistrate) to revive the prosecution. In the present case the Sessions Judge wrote:

I have translated and considered the whole of the evidence on the record, and the conclusion to which I have come is that there must be further inquiry.

The meaning of that is plain, and it contains ample reasons for the order. It would have been improper for the Judge to comment on the evidence in detail, as such a proceeding would tend to prejudice the accused at the trial. Moreover, even if the order had been in the same terms as that in the Calcutta case, the Calcutta ruling would be no precedent for setting aside the conviction.

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Criminal  
Revision  
No. 398B of  
1907.

January  
24th,  
1908.

Before Mr. Justice Harloll.

1. TUCK SEW } v. HAINKEE.  
2. E MIN }

McDonnell—for applicants | Lentaigue—for respondent.

Grounds for sanctioning prosecution for giving false evidence—Evidence recorded in original case—Further preliminary inquiry—Criminal Procedure Code, 1898, s. 195.

A prosecuted B for criminal breach of trust. After A and the witnesses produced by him had been examined by the Magistrate, B was discharged. On the application of B, sanction to prosecute A and one of his witnesses for giving false evidence was then granted by the Magistrate, although record as it stood only showed that their evidence might or might not have been false.

Held,—that sanction for a prosecution for giving false evidence should not be granted unless there are good and reasonable grounds for considering that the prosecution will be successful; but

Held further,—that in deciding whether there are such grounds the Magistrate is not restricted to the consideration of the evidence recorded in the original case, but should, if necessary, hold a full inquiry. The proceedings were returned for such an inquiry.

*Queen-Empress v. Kuppu*, (1884) I.L.R., 7 Mad., 563; *Mokun Maistry v. Valoo Maistry*, 1 L.B.R., 286; *Queen-Empress v. Motha*, (1897) I.L.R. 20 Mad., 339; *Shashi Kumar Dey v. Shashi Kumar Dey*, (1892) I.L.R., 19 Cal., 345; followed.

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TUCK SEW  
v.  
HAIN KEE.

Tuck Sew and E Ming apply that the sanction to prosecute them for giving false evidence granted by the Western Subdivisional Magistrate, Rangoon, in Criminal Miscellaneous Case No. 227 of 1907, be revoked. The facts are as follows. Tuck Sew charged one Hain Kee with Criminal breach of trust with regard to a certain sauce factory and its contents. Process issued against Hain Kee, and an enquiry was made, when Tuck Sew and his witnesses, inclusive of E Ming, were examined. The Magistrate found that Tuck Sew failed to establish the charge he made against Hain Kee and so discharged the latter. That order still stands good, though application was made to revise it to the District Magistrate, Rangoon, and to this Court. Hain Kee then applied to the Magistrate who held the enquiry into the charge that Tuck Sew brought for sanction to prosecute him and his witness E Ming for giving false evidence. The Magistrate without holding any further enquiry granted sanction, and now it is desired that the sanction be revoked on the ground (1) that the mere fact of the charge laid by Tuck Sew not having been proved was not in itself sufficient ground for granting sanction to prosecute him and E Ming, as beyond the judgment of the Magistrate there was nothing on the record to show that there were sufficient grounds for granting the sanction; (2) that the Magistrate erred in granting sanction without satisfying himself that it was a proper case to put your petitioners on their trial, and that there were materials to justify a prosecution; (3) that the order of sanction is illegal inasmuch as Tuck Sew has not been called upon or allowed to bring forward all the testimony on which he relied in support of his accusation, and Hain Kee should have been asked what evidence he proposed to adduce in support of the charges, and that the evidence should have been reviewed before granting sanction; (4) that the Magistrate should have specified the particular words which constitute the perjury for which permission to prosecute was given, and the section of the Indian Penal Code under which he authorised criminal proceedings to be taken; and (5) that the Magistrate erred in not calling on the accused to show cause why sanction should not be granted under section 211.

Amongst the objects of section 195 of the Criminal Procedure Code two are undoubtedly the protection of persons from being prosecuted on insufficient grounds and from malice or ill-will, and the prevention of prosecutions where the public interest cannot be served. As was laid down in the case of *Queen-Empress v. Kuppu* (1), the object of giving the power to sanction is to secure as far as possible that no man shall be prosecuted unless the Court hearing the case or a superior Court is satisfied that it is a proper case to put a party on his trial. Again in the case of *Mokun Maistry v. Valoo Maistry* (2), it was observed by Irwin, J. :—

A Judicial Officer to whom an application for sanction is made should put

(1) (1884) I.L.R. 7 Mad., 560. | (2) 1 L.B.R., 286.



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himself in the place of applicant and consider—"If I were prosecuting this case myself am I in a position to produce such evidence as, if un rebutted, would support a conviction?"

It certainly seems to me that sanction should not be given for a prosecution for giving false evidence unless there are good and reasonable grounds for considering that the prosecution will be successful.

Applying the above principles to the present case it certainly seems to me that, if Tuck Sew has brought a false charge and bolstered it up by false evidence, it is a case in which the public interests will be served by sanctioning a prosecution. The charge was a very grave one, and if it is false, there has been gross perjury. As the case at present stands, it seems impossible to say whether perjury has been committed or not, and there do not seem to me to be good and reasonable grounds for assuming that a prosecution for perjury will probably result in success. In the regular enquiry only the complainant and his witnesses were examined and Hain Kee was never called on for his defence. The conclusion I have arrived at is: the complainant's story may be true and may be false. There is a suspicion that it may be false. The record as it stands does not in my opinion disclose grounds for sanctioning prosecutions for perjury. It seems to me that the Magistrate should have called on Tuck Sew and E Ming to show cause against sanctioning their prosecutions for perjury, and should then have proceeded to hold a preliminary enquiry, calling on Hain Kee to produce the evidence that he relied on to prove the charge, and hearing Tuck Sew and E Ming, and allowing them to produce such further evidence as might be necessary. He would then have been in a position to decide whether sanction should be granted or not. This view is not without authority, for in the case of *Queen-Empress v. Motha* (3) it was held that a Magistrate in deciding whether to sanction, under the Indian Penal Code, section 195, a prosecution for giving false evidence has power to hold an enquiry and record other evidence besides that in the case before him, in the course of which the offence is supposed to have been committed. The learned Judges in the course of their judgment in that case said:—

We have no doubt but that it is now open to a Magistrate, when a person is accused of having committed before him an offence punishable under section 193 of the Indian Penal Code, to inquire into the truth of the accusation, and then if it seems proper, in the interests of public justice, to give sanction for the prosecution, even though the original record did not on its face disclose that the offence had been committed. The words of the section contain no limitation to an offence appearing on the face of the record though nothing would have been easier than to have expressed such limitation if it was intended to have effect. To admit the petitioner's contention would be by an artificial rule to screen from prosecution men who might have committed the grossest offences against public justice and offences, perfectly capable of being proved, merely because owing to surprise, accident, oversight, or unavoidable circumstances, evidence of the offence was not, or could not be, produced before the Court at the same time that the offence was committed.

Again in the case of *Shashi Kumar Dey v. Shashi Kumar Dey* (4), it was held that it is competent for a Civil Court before which a case may have been settled without any evidence being gone into, and which has grounds for supposing an offence of the nature referred to in section 195 of the Code of Criminal Procedure has been committed before it during the pendency of such case, to make a preliminary enquiry and thus satisfy itself whether a *prima facie* case has been made out for granting sanction, and if so satisfied to grant sanction for the prosecution of the person alleged to have committed such offence.

My opinion on the present case being as it is, what action should now be taken. There are not sufficient grounds before me on which to pass any order. That being so I do not consider that I should at once revoke the sanction and so conclude the case. To do so might be protecting Tuck Sew and E Ming from a prosecution that they deserve, and that should take place in the interests of public justice. I accordingly remand the proceedings back to the Magistrate with instruction to hold such an enquiry as I have indicated above. The proceedings should then be resubmitted to this Court with his opinion and reasons as to whether the present sanction should be allowed to stand or should be revoked in the light of the facts brought forward at the further enquiry.

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TUCK SEW  
v.  
HAIN KEE.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. NGA YWE AND NYAN BU.

*Hurt—affray—Trial of complainant and accused together after hearing prosecution evidence—Indian Penal Code, ss. 160, 324.*

A was prosecuted by the police for voluntarily causing hurt with a *da* to B. The evidence for the prosecution showed that A and B had got drunk and fought with *das* in the public street, each wounding the other; and the Magistrate, after hearing this evidence, tried both A and B together for affray, without framing any charge of causing hurt.

*Held*,—that the Magistrate's procedure was illegal. The evidence established a *prima facie* case of causing hurt with a *da* against A, and he ought to have been tried for that, instead of for the minor offence of affray.

\* \* \* \* \*

Nga Ywe was prosecuted by the police for voluntarily causing hurt to Nga Nyan Bu with a *da*. The Magistrate examined Nga Nyan Bu and other witnesses, and finding that Nga Ywe and Nga Nyan Bu had got drunk and fought with *das* in the public street, and wounded each other with the *das*, he made the complainant an accused, and tried the two together for affray, and did not frame any charge of causing hurt. He tried Nga Nyan Bu on evidence given on oath by himself and other persons. This was illegal. The evidence established a *prima facie* case of causing hurt with a *da* against Nga Ywe, and ought to have been tried for that, as it was a more serious offence than affray. Nga Nyan Bu could have been separately tried afterwards for voluntarily

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causing hurt to Nga Ywe. The sentence which the Magistrate inflicted shows that he considered the two accused to have committed more serious offences than affray.

As the convictions were not appealed against and the sentences have expired, I do not think it necessary to direct a new trial.

Civil 2nd  
Appeal  
No. 159 of  
1907.

January  
30th,  
1908.

Before Mr. Justice Irwin, C.S.I.

MA YIN v. MA PU.

Higinbotham—for appellant (defendant).

Lentaigne—for respondent (plaintiff).

*Suit for possession of land—Defence based on alternative title—Specific title—Gift—Adverse possession.*

It is open to a party to allege a specific title to property, and to the alternative a title by twelve years' adverse possession.

*Goluck Chunder Masanta v. Nundo Comar Roy*, (1878) I.L.R. 4 Cal., 699, followed.

Respondent sued for possession of a house and land. Appellant pleaded that the property had been given to her deceased husband, Tun Win, absolutely, and that she had been in adverse possession for twenty years, and that the suit was therefore barred by limitation. The plaintiff got a decree.

The Court of first appeal found the gift not proved, and as to the plea of limitation the learned Judge said, "Although it is raised in the written statement, I do not think such a plea is consistent with the allegation of gift made in paragraph 3 of the written statement. The plaintiff said the defendant's occupation was permissive. The defendant said it was by virtue of a gift. By the gift therefore she must stand or fall." There was therefore no finding on the question of adverse possession for over twelve years.

On the point of law the learned Judge was wrong. It is open to a party to allege a specific title and in the alternative a title by twelve years' possession. —*Goluck Chunder Masanta v. Nundo Coomar Roy* (1).

I therefore set aside the decree of the Divisional Court, and remand the appeal to that Court for a fresh decision on the question of limitation on the evidence. The costs of this appeal will follow the event.

(1) (1878) I. L. R. No. 4 Cal., 699.

*Before Mr. Justice Irwin, C.S.I.*

**KING-EMPEROR v. NGA PAW.**

*Appeal—Trial held by second class Magistrate—Enhancement of Magistrate's powers before conclusion of trial—Criminal Procedure Code, 1898, s. 407.*

*Criminal  
Revision  
No. 24B of  
1908.  
February 4th,  
1908.*

The accused was tried and convicted by a Magistrate, who, at the commencement of the trial, held only second class powers, but who, before judgment was passed, was invested with first class powers.

*Held*,—that is the trial had been held by a second class Magistrate, the conferment of first class powers before its conclusion did not affect the question of appeal; and that therefore an appeal lay to the District Magistrate.

The complaint was presented on the 3rd October to Maung Pyu, a Magistrate of the second class. The trial began on the 19th October and ended on the 21st November. Judgment was pronounced on the 22nd November.

By Notification No. 809, dated the 15th November 1907, Maung Pyu was appointed a Magistrate of the first class.

The accused on the 2nd December presented an appeal to the District Magistrate, who returned it for presentation to the Sessions Judge, stating that Maung Pyu had received first class powers on the day that he passed the judgment. That was the date of the endorsement forwarding a copy of the notification to the Deputy Commissioner.

No appeal lies to the Court of Session, because the sentence is a fine of Rs. 30. The Sessions Judge has submitted the record to this Court, as he is of opinion that no offence is proved.

It is enacted by section 407 of the Code of Criminal Procedure that any person convicted on a trial held by any Magistrate of the second class may appeal to the District Magistrate. In the present case the trial was certainly held by a Magistrate of the second class, and the fact that he was appointed a Magistrate of the first class before the conclusion of the trial makes no difference. An appeal therefore lies to the District Magistrate.

The appeal is on the file of Criminal Revision No. 140 of the Court of Session. The Sessions Judge will return it to the applicant, in order that he may present it again to the District Magistrate.

*Before Mr. Justice Irwin, C.S.I.*

**ASAMUDDIN KARI v. KARIM SHUKOOR.**

*A. C. Dhar*—for appellant (defendant).

*S. C. Dutta*—for respondent (plaintiff).

*Civil Misc.  
Appeal  
No. 85 of  
1907.*

*February 6th,  
1908.*

*Adjournment of appeal for record of further evidence by original Court—  
Fixing of date for further hearing—Suspension of proceedings till return of  
record—Dismissal of appeal for default.*

When the Appellate Court directs further evidence to be taken by a lower Court no date should be fixed for further hearing in the Appellate Court until the record is returned.

On 5th December the District Court passed an order directing the Township Court to take evidence and to send it up when taken to the District Court. The entry in the diary under that date is "No

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ASAMUDDIN

KARI

KARIM

SHUKOOR.

appearance. Further preliminary judgment pronounced. Hearing adjourned 22nd January 1907.

On 22nd January there was no appearance, and the appeal was dismissed under section 556.

Meantime the order to take evidence does not appear to have been sent to the Township Court. The copy of the order is dated as certified on 6th December, but it is marked as having been received in the Township Court on 5th February 1907. There were several adjournments, and the evidence was submitted to the District Court on 21st May.

Appellant applied on 8th February to have his appeal reopened. He did not deny that he knew that 22nd January was fixed, but he said he was under the *bonâ fide* impression that the appeal could not be heard on that day as the evidence had not been taken by the lower Court. The application was rejected on the 9th February.

The District Judge was obviously wrong in fixing any date for appearance before the record was returned. If his orders had been promptly communicated to the lower Court the presence of the parties might have been required by the lower Court on 22nd January, and in that case they could not appear before the Appellate Court.

If the parties had appeared before the Appellate Court on 22nd January nothing could have been done except to adjourn the appeal.

The non-appearance having been caused by the Judge's own error, he ought to have readmitted the appeal. In fact it is doubtful whether section 556 would justify the Judge in dismissing the appeal on 22nd January at all, as the adjournment to that day was an improper one.

I set aside the order of 9th February, and direct that the appeal be readmitted and disposed of according to law.

Respondent to pay the costs of this appeal.

Before Mr. Justice Irwin, C.S.I.

S. N. NACHIAPPA CHETTY v. A. K. A. M. CHOKALINGAM CHETTY.

P. N. Chari—for appellant (defendant).

A. D. Nariman—for respondent (plaintiff).

Special Civil  
2nd Appeal  
No. 52 of  
1907.

February  
13th, 1908.

*Oral agreement adding to terms of document—Admissibility in evidence—Degree of formality of document—Petition-writer—Lawyer—Registration—Mortgage of stock-in-trade—Indian Evidence Act, 1872, s. 92, proviso (2).*

A mortgaged certain shops and their stock-in-trade to B. The mortgage deed, although registered, was drawn up, not by a lawyer, but by a petition-writer. B alleged an oral agreement that the mortgage should include goods which might be brought into the shops subsequent to the date of the mortgage. The terms of the deed were found to be not inconsistent with such an agreement.

*Held*,—that in considering the degree of formality of the document, the fact that it was not drawn up by a skilled lawyer was of much greater importance than the fact of its being registered. Evidence of the oral agreement was held to be admissible under proviso 2 to section 92 of the Evidence Act.

This is a suit on a mortgage of the shops belonging to Kadaru Hasan and the stock in-trade in the shops. Nachiappa had attached the stock-in-trade before judgment in another suit. Chokalingam in his plaint alleged that it was agreed that the mortgage would include the

goods which may be brought in (*sic*) the shop subsequent to the date of mortgage as well. This is the only point now in issue.

The Court of first instance held that the term "stock-in-trade" is not restricted to the identical articles in the shop at the time of the mortgage, but includes all goods found from time to time in the shop for sale. The Judge of the Divisional Court disagreed with that, and said it was not the plaintiff's case. What the plaintiff set up was a separate oral agreement that all subsequent additions to the stock should be considered as part of the security. The learned Judge held the agreement proved. He modified the decree only by substituting a declaration for the order for sale, as the goods had already been sold and dispersed. The finding of the Divisional Judge that the mortgage does not of itself cover any of the stock-in-trade except what was in the shops at the time of the mortgage is founded on this passage in Ghose\* :

An assignment by way of mortgage of future property can only be made by apt words. Where such words are wanting, the security will be confined only to property in existence at the time. Thus, if a stock-in-trade is mortgaged, the security will not include, in the absence of any expression of intention to the contrary, effects subsequently brought on the premises by the mortgagor, for the purpose of replacing those disposed of, or consumed in the course of business.

This is based on two rulings, both of English Courts. The Divisional Judge presumably had not access to those rulings. I have read them, and in my opinion, so far as stock-in-trade is concerned, they do not altogether bear out the terms used by the learned lecturer. In any case they are not binding in India, and I am inclined to think that the Judge of the Court of first instance put a very reasonable construction on the terms used in the deed, which are the equivalent of "stock-in-trade."

But it is not necessary to decide this point, because I agree with the learned Judge that the oral agreement is proved. It is certain that the sale-proceeds were deposited with plaintiff, and that he made advances from the sums so deposited for the purpose of replenishing the stock. This arrangement necessarily implies an agreement that all the stock from time to time in the shops should be covered by the mortgage.

Appellant argues that plaintiff is debarred by section 92 of the Evidence Act from giving evidence of the oral agreement. I was referred to the last sentence of proviso 2 to that section, and it was pointed out that the mortgage is registered, though registration is not compulsory. On the other hand, I observe that the document was drawn up by a petition-writer. In considering the degree of formality of the document the fact that it was not drawn up by a skilled lawyer is of much more importance than the fact that it is registered.

The only passage in the document which calls for remark is this : "When any money is obtained by sale of the goods of the said mortgaged shops, it shall not be paid to others in consideration of other debts, but it shall be paid to creditor Chokalingam Chetty in consideration

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\* The Law of Mortgage in India, 3rd Ed., 239.

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of his principal and interest." In my opinion this is not inconsistent with the oral agreement by which the sale-proceeds, after being so paid to Chokalingam, were paid back, wholly or partly, to the mortgagor to enable him to replenish his stock, and by which the stock so replenished was covered by the mortgage. I therefore hold that the evidence of the oral agreement is admissible under proviso 2 to section 92 of the Evidence Act.

The appeal is dismissed with costs.

*Criminal  
Revision  
No. 4B of  
1908.*

*February  
14th, 1908.*

*Before Mr. Justice Irwin, C.S.I.*

1. PO LU	} v. SHWE KYO.
2. MA THIT	
3. HLA YA	
4. HLA WA	
5. BA OH	

*Bodeker*—for applicants. | *Christopher*—for respondent.

*Criminal trespass—Presumption of intention to annoy—Indian Penal Code, ss. 441, 447.*

In consequence of the decree in a civil suit, A, the defendant, was evicted from a house and the land on which it stood, and B, the plaintiff, was put in possession. Two days later A, whose defence in the suit had been barred on a legal point, re-entered the land and lived in the house. He was allowed to remain for 19 months, at the end of which time B prosecuted him for criminal trespass by the re-entry.

*Held*,—that the circumstances did not justify a presumption that A's intention was to annoy B; and is no other criminal intention was even suggested, that the offence of criminal trespass had not been committed.

*Po Ke v. King-Emperor*, 2 L.B.R., 319, distinguished.

The complaint was presented on 21st June 1907. It contains allegations that the accused were evicted from the land and the complainant put in possession on 9th November 1905, and that the accused had again taken possession of the land, but the date on which they again took possession was not mentioned. The complainant was examined and said, "I won the suit about three or four months ago." This was a flat contradiction of the allegation in the complaint that he had executed his decree in November 1905; but the Magistrate took no notice of the contradiction, and issued summons.

He charged the accused with forcibly entering on the land in March or April, no year specified. Apparently March or April 1907 was meant. Forcibly entering is not necessarily an offence. Evidence was adduced that the accused re-entered on the land two days after they had been evicted in November 1905. That was what they were convicted of. The entry was held to be an offence because accused could not have a *bonâ fide* belief that they were entitled to the land. The Magistrate did not discuss the question of what the intent was.

There can be no criminal trespass unless the accused's intent was to commit an offence, or to intimidate, insult or annoy any person in



possession of the property. In cases of this kind the question of intention is a difficult one. In *Po Ke v. King-Emperor* (1), it was held that the ordinary rule that a man is presumed to intend the ordinary and natural consequences of his actions applies to cases of criminal trespass. In that case the complainant was in possession of land and was ploughing it when the accused, without any *bona fide* belief that he had a right to do so, entered and ploughed it himself. The natural result was to cause annoyance to the complainant, and because the accused had no *bona fide* belief that he had a right to enter it was held that he intended to annoy the complainant.

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In the present case, though the complaint was about land, it appeared in the evidence that there was a house on the land, which the accused occupied. It was not said that after the eviction the complainant left any care-taker in charge. Two days after the eviction the accused re-entered the house and lived in it from that time till June 1907, some 19 months, and there is no suggestion that during that time the complainant made any attempt to turn them out or to occupy either house or land himself. Even if the prosecution had been instituted a few days after the offence was committed, the presumption of intent to annoy would not be so strong as in *Po Ke's* case. The accused having been left undisturbed so long as 19 months, it can hardly be said that the presumption arises at all. There is another point to be considered, although it is by no means decisive. The civil suit which the complainant won was a suit on a registered conveyance. The defence was that when defendant signed the conveyance they believed it to be a mortgage. This issue of fact never was tried; the suit came to an abrupt conclusion through the Full Bench ruling that no evidence could be given to support the defence. It was on the decree thus given that the accused were evicted. They were still engaged in litigation about the land in the Civil Court when this charge was tried. It cannot be assumed that accused had sufficient legal training to understand fully that even if their defence were perfectly true, yet they had absolutely extinguished their own rights by signing the conveyance. A consideration of this kind, which would be irrelevant in a Civil Court, cannot be ignored in trying a criminal charge which depends on the intention of the accused, when the criminal intention, if it exists at all, is a secondary one; for in this case unquestionably the main intention of the accused was to recover possession of the property.

If the Magistrate had examined the complaint properly, and ascertained that the trespass took place in November 1905, and that the accused had been left undisturbed for 19 months, I think it is very probable that he would have dismissed the complaint summarily, regarding it as an attempt to abuse the criminal law.

Considering all the facts I am of opinion that intent to annoy cannot safely be presumed. No other criminal intent can even be suggested. I therefore set aside the convictions and sentences and acquit the accused, and direct that the fines be refunded.

(1) 2 L.B.R., 319.

Criminal  
Appeal  
No. 6 of  
1908.

February  
21st,  
1908.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge,  
and Mr. Justice Ormond.

GAUNG GYI v. KING-EMPEROR.

Dawson—Assistant Government Advocate.

*Examination of accused regarding confession made under improper inducement inadmissible in evidence—Admissibility in evidence of statements made to police—Criminal Procedure Code, ss. 287, 342—Indian Evidence Act, ss. 26, 27.*

An accused person made a confession under improper inducement by the police. The committing Magistrate admitted the confession in evidence and examined the accused with regard to it. The accused admitted it.

*Held*,—that the confession being inadmissible the Magistrate should not have questioned the accused upon it. The examination of the accused, so far as it concerned the confession, could not be said to have been duly recorded, and therefore neither the confession, nor the answers to the Magistrate's questions regarding it, were admissible in evidence in the Court of Session.

When a fact is discovered in consequence of a statement made by an accused person in the custody of the police, only so much of the statement as led directly to such discovery may be proved under section 27 of the Evidence Act.

s. The accused had pointed out to the police the places where certain acts had according to his statement, been done.

*Held*,—that this did not render his statements regarding such acts admissible in evidence.

*Ormond J.*—The appellant (1st accused) has been convicted of murder and sentenced to death. A dacoity was committed on the 26th July 1907, at the Kalondaung *pôngyi-kyaung*, when a *pôngyi* (U Wunna) and a *koyin* (Maung Aung Ba) were killed by the dacoits with a *da*.

Amongst other property the dacoits took away some tins of biscuits and condensed milk. A witness, Maung Tun Gyaw, states that about five months before the occurrence, the accused told him he was going to dacoit the deceased *pôngyi*; and five or six days after the occurrence this witness told one Maung Thu Daw that he suspected the accused of being connected with the dacoity, having told no one of it before that. On the 16th September the accused was arrested at Taungbobauk village with a *da* in his possession, the blade of which is identified by *koyins* as the property of the deceased *pôngyi* with a different handle. The accused was apparently absconding on account of another offence. The accused was induced by the police to make a confession of having taken part in the dacoity; and the committing Magistrate admitted it in evidence. The Sessions Judge has held that although the confession was inadmissible directly, because it was caused by promises held out to the accused by the District Superintendent of Police, yet it was indirectly admissible, inasmuch as the committing Magistrate examined the accused with respect to it and the accused admitted it. But the examination of an accused is for the purpose of enabling him to explain any circumstances appearing in evidence against him, and not for the purpose of filling up a gap for the prosecution. The confession was clearly inadmissible and therefore the accused should not have been questioned about it.

The Sessions Judge has held that the confession is corroborated by the accused having pointed out to the police the places where certain

acts were committed. But the effect of an accused's pointing out of the police the places where certain acts were committed is merely to accentuate or particularize the accused's verbal statements made to the same effect. The conduct of an accused in doing so is nothing more than making a statement by signs instead of words, and should be treated as part of his statement; and if the prosecution relies on such statements as being true, *e.g.*, to show that the accused had an accurate knowledge of the circumstances, such statements are incriminating statements in the nature of confessions and are inadmissible in evidence.

Some empty biscuit tins and condensed milk tins were found in a well which was pointed out to the police by the accused: the fact that the discovery was made in consequence of information received by the police from the accused is inadmissible, and so much of the information given by the accused as led directly to such discovery would be admissible; but a statement made by the accused to the police that the tins had been stolen by the dacoits is inadmissible, because such statement is not connected directly with the discovery. And there is nothing else to connect the tins with the dacoity.

The only evidence therefore that is admissible to connect the accused with the dacoity is that some five months before the occurrence he stated that he intended to dacoit the *pôngyi* and that, when he was arrested seven weeks after the occurrence, he was found with a *da*, the blade of which, according to the evidence of the *kòyins*, belonged to the deceased *pôngyi*.

This is not sufficient evidence to support a conviction. The conviction in my opinion should be set aside and the accused set at liberty.

*Irwin, Officiating C.J.*—Under section 287 of the Code of Criminal Procedure the examination of the accused *duly recorded* by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence. Under section 342 the examination must be for the purpose of enabling the accused to explain any circumstances appearing in evidence against him. In the present case the accused was examined about a confession which was not admissible in evidence. It cannot be said that these questions and the answers to them were duly recorded, for the questions were such as are not allowed by the law to be put. The answers to those questions are therefore, in my opinion, not admissible in evidence against the accused. It was only through the medium of those answers that the confession was admitted in evidence by the Sessions Judge. It was wrongly admitted.

Evidence that the accused pointed out the places where the *pôngyi* was killed and the *koyin* was tied up is not admissible under section 27 of the Evidence Act, because no fact was discovered in consequence of the information given by the accused.

I concur with my learned colleague in thinking that the admissible evidence on the record is not sufficient to support a conviction. The conviction and sentence therefore must be set aside, and the appellant acquitted and released.

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GAUNG GYI

V.  
KING-  
EMPEROR.

Special Civil  
2nd Appeal  
No. 137 of  
1907.

February  
24th, 1908.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.

PO KIN v. MAUNG LA.

*Nicol*—for appellant (defendant). | *Maung Thin*—for respondent (plaintiff).

Basis of claim to easement—Easement of necessity—Presumptive right to easement  
—Indian Limitation Act, 1877, s. 26 (2).

An easement of necessity cannot arise in any other way than on severance of tenements.

Where A claimed the right to take plough and water through B's land, and there was no allegation of severance.

*Held*,—that A's claim could be based only on clause (2) of section 26 of the Limitation Act.

*Morgan v. Kirby*, (1878) 1 L.R. 2 Mad., 46, followed.

*Tha Zan v. U San Win*, 2 L.B.R., 134, referred to.

The first issue fixed in this case is this: "Is the easement to take plough and water through the defendant's land as of necessity?" Both the lower Courts have treated this as a material issue in this case. No such issue arises on the pleadings, nor on the evidence.

Easements may arise in several ways. One of these ways is by implied grant. Gale says that upon the severance of an heritage into two or more parts a grant will be implied . . . of all those easements without which the enjoyment of the severed portions could not be had at all, and this class are usually termed easement of necessity.\* The law was laid down to the same effect by the High Court of Madras in *Morgan v. Kirby* (1) at page 52 of the report. An easement of necessity cannot arise in any other way than on severance of tenements.

In the present case there is no allegation of severance. Defendant's holding, which plaintiff alleges is the servient tenement, lies between two holdings belonging to plaintiff. The alleged dominant tenement is the eastern holding, No. 395, which plaintiff says he inherited from his father. The western holding, No. 398, plaintiff says he bought, in his first examination 12 years ago, in his second examination 20 years ago. In his plaint he alleged that since the time of the Burmese Government he had exercised the rights of taking his ploughs and conducting water across defendant's holding. He cannot base his claim to easements on necessity. If he has a right to the easements he claims it must be under the second clause of section 26 of the Limitation Act: "Where any way or water-course, or the use of any water, or any other easements (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years, the right to such way, water-course, or other easement shall be absolute and indefeasible." The period of twenty years must have ended within two years next before the institution of the suit.

The District Judge gave a very lucid exposition of the facts, but he regarded the easement as one of necessity, and paid no attention to the question how long the plaintiff has enjoyed the way for his plough and the way for water to reach his eastern holding. If he has not

\* The Law of Easements, 7 Ed., p. 96.

(1) (1878) 1 L.R. 2 Mad., 46.

enjoyed them without interruption for twenty years he has no right. He suffers, no doubt, from defendant's turning his paddy holding into a peas garden and fencing it in, but the law cannot help him unless he has established his right by twenty year's use.

The question whether the user had lasted for twenty years was not put in issue, and neither the Judge nor the parties seem to have had it in their minds at all. The only evidence bearing on the point that I can find is a statement by the first witness for the plaintiff that the plough had been taken through Maung Kin's land for more than twenty years, and this statement by the fourth witness: "About fifteen years up that Maung Lu used to go through Maung Po Kin's land with plough."

I refer to the lower Appellate Court the issue, "Have the easements claimed by the plaintiff been peaceably and openly enjoyed as of right, without interruption, by the plaintiff and his predecessors in title, for twenty years ending within two years next before the date of institution of this suit?"

An authoritative definition of the term "as of right" will be found in the report of *Maung Tha Yan v. U San Win* (2).

The District Court will either try the issue itself or refer it for trial to the Court of first instance. In the latter case the Township Court will record a finding on the issue. The District Court will also, record a finding. The proceedings will then be returned to this Court.

*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.*

KA KA v. KING-EMPEROR.

*DeGlanville*—for appellant.

*Sanction to prosecution—Illegal possession of firearms—Previous sanction—Institution of proceedings—Charge—Indian Arms Act, ss. 19 (e), (f), 29—Criminal Procedure Code, ss. 190, 195, 535, 537 (b).*

The accused was sent up by the police for trial under section 19 (e) of the Arms Act for illegally going armed. After hearing the prosecution, the Magistrate charged him in the alternative with this offence and with illegal possession of an arm under section 19 (f). The sanction of the District Magistrate, required under section 29, was not obtained till after the framing of the charge. The accused was finally convicted under section 19 (f).

*Held*,—that as the police sent up the case under clause (e) of section 19, proceedings under clause (f) were not instituted until the Magistrate framed the charge under that clause. Although the charge was actually framed without jurisdiction, the Magistrate might have instituted proceedings afresh, after receiving sanction, by framing a fresh charge and as the accused had not been in any way prejudiced by the procedure adopted, the absence of a fresh charge after the receipt of sanction was cured by section 535 of the Code of Criminal Procedure.

Section 537 (b) of the Code of Criminal Procedure does not cure the want of sanction in any case except when the sanction is required under section 195 of the Code.

*Queen-Empress v. Pa Twe Wa*, (1896) 1 U.B.R., 2; *King-Emperor v. Htuktalwe*, 2 L.B.R., 302; followed.

The appellant was prosecuted by the police for going armed with a revolver, an offence under section 19 (e) of the Arms Act. On taking the evidence the Magistrate doubted whether a person could be said to

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PO KIN

v.

MAUNG LA.

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1908.*

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KAKA  
v.  
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EMPEROR

go armed when he carried an unloaded revolver wrapped up in a cloth. He therefore charged the accused in the alternative with going armed under clause (e) or with possessing the revolver under clause (f) of section 19. I may remark in passing that the Magistrate mixed up the two offences in one head of charge, thereby contravening section 233 of the Code of Criminal Procedure.

When the charge was framed the accused's advocate submitted that the Court had no jurisdiction to try the accused under clause (f) without the previous sanction of the District Magistrate under section 29 of the Arms Act. The Magistrate then submitted the record to the District Magistrate, who wrote on the diary, "I sanction the institution of proceedings under section 19 (f) of the Arms Act against Kaka." The trial proceeded, and the accused was convicted under clause (f).

The first ground taken in appeal is that the Magistrate had no jurisdiction because the case was instituted without the sanction required by section 29. The Magistrate held that the want of sanction before institution was cured by section 537 (b) of the Code of Criminal Procedure. In that point he was certainly wrong. The contrary was held in Upper Burma in the case of *Queen-Empress v. Po Twe Wa* (1), and the same principle was followed by this Court in the case of *King-Emperor Htuktalwe* (2) in which sanction was required under section 339 (3) of the Code of Criminal Procedure. Section 37 (b) does not cure the want of sanction in any case except when the sanction is required under section 195 of the Code of Criminal Procedure.

The question whether the defect was cured by obtaining sanction after the charge was framed, but before the trial was concluded, is not quite so easy to answer. I have found no ruling on the point. The terms of section 29 are that no proceedings shall be instituted against any person in respect of an offence punishable under clause (f) without the previous sanction of the District Magistrate. This must be read with section 190 of the Code of Criminal Procedure, under the provisions of section 1 and section 5 (2) of the same Code.

The verb "institute," which is used in section 29 of the Arms Act is not used in section 190 of the Code of Criminal Procedure and it is not necessarily synonymous with the presentation of a complaint or a police report, nor with the act of a Magistrate in taking cognizance of an offence. In the present case the police submitted a report in which it was stated that the accused was found carrying the revolver, and that was described as an offence under clause (e). The fact alleged by the police constitutes an offence under clause (f) as well as under clause (e), but proceedings under clause (s) were not instituted by the submission of the police report to the Magistrate. In my opinion proceedings under clause (f) were instituted when the Magistrate framed the charge under that clause. The Magistrate took cognizance of the offence, whatever it was, under section 190 (1) (b) upon a police report of facts which constitute the offence, and no matter what name

(1) (1896) I U.B.R., 2.

(2) 2 L.B.R., 302.

the police gave the offence, and no matter what section or clause they quoted, the Magistrate would, under section 254, have been right in framing the charge under clause (f) but for the existence of section 29 of the Arms Act. If before framing the charge he had obtained the sanction required by that section, his proceedings would have been absolutely correct, and he would have had full jurisdiction to try the accused. The framing of the charge at the time when he did frame it was without jurisdiction.

When the accused's advocate pointed out the want of sanction, he asked the Magistrate to cancel the charge under clause (f). No doubt the Magistrate might have amended the charge and probably that would have been his proper course; but if he had done so, and then obtained sanction as he did, there would be nothing to prevent him from again framing a charge under clause (f), and proceeding with the trial. In my opinion it cannot be said that the Magistrate was without jurisdiction to try the case merely because he framed the charge before receiving sanction and did not frame a fresh charge after receiving sanction. At the time when he took the evidence for the prosecution no sanction was required because proceedings in respect of an offence under clause (f) had not then been instituted, and it must be remembered that under section 256 of the Code the accused had the right to recall all the witnesses for the prosecution after the charge was framed. He was therefore in no way prejudiced by the Magistrate's procedure. Indeed, on the question of prejudice his advocate only said that he was prejudiced by being convicted and sentenced. This is misuse of the word "prejudice." He was damnified, as every criminal is damnified by being convicted. There was no difficulty thrown in the way of his defence that would not have existed if the sanction had been given before the police report reached the Magistrate. The whole substance of the objection of law that has been raised is simply that the Magistrate had not jurisdiction. My opinion is that he had jurisdiction, notwithstanding the word "previous" in section 29, because in the circumstances I have set forth the proceedings in respect of the offence under clause (f) cannot be said to have been instituted when the Magistrate received the police report. Considering the terms of the District Magistrate's order it may be said that proceedings in respect of the offence under clause (f) were instituted again after the sanction was received, and in that case the absence of a charge framed after sanction is certainly cured by section 535, Code of Criminal Procedure.

\* \* \* \* \*

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge, and  
Mr. Justice Ormond.

KHATOON BEE *v.* ABDUL AND 7 OTHERS.

*Vertannes*—for appellant.

*J. R. Das*—for 1st, 2nd, 7th and 8th respondents.

*Israil Khan*—for 3rd, 5th, 6th, 7th and 8th respondents.

*Appeal*—Order to file award—Decree—*Indian Arbitration Act, 1899*, ss. 6, 11 (2),  
15—*Civil Procedure Code*, s. 2.

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KAKA  
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EMPEROR.

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KHATOON  
BEE  
v.  
ABDUL  
RAHMAN.

No appeal lies against an order of the Court directing an award to be filed under the Indian Arbitration Act.

*Quære*.—Does the Act contemplate an order to file an award being made by the Court at all?

*Janokey Nath Guha v. Brojo Lal Guha*, (1906) I.L.R. 33 Cal., 757, referred to.

*Irwin, Officiating C.J.*—This is an appeal against an order made on the Original Side of this Court, directing that an award be filed under the Indian Arbitration Act, 1899. The respondents have taken a preliminary objection that no appeal lies.

The Act contains no provision for an appeal. There can be no appeal unless it is allowed by some other law.

Under section 14 of the Lower Burma Courts Act an appeal from a decree made by a single Judge on the Original Side lies to a bench of two Judges, and an appeal from an order made by a single Judge on the Original Side lies only when an appeal from such order is permitted by any law for the time being in force. We have not been referred to any law permitting an appeal from an order, as distinguished from a decree, under the Arbitration Act. The decision of the point raised therefore depends on whether the order appealed against is a decree.

No ruling bearing directly on this point was cited and I have not been able to find any. There are many rulings on the question whether an appeal lies against decrees passed under Chapter 37 of the Code of Civil Procedure, but they afford little or no help in the present case.

The course of the present case was as follows. On 26th August 1905 the arbitrators sent their award and connected papers to the Assistant Registrar with a letter, which did not contain any request to file the award in Court. On 30th August 1905 one of the parties to the submission presented a petition praying that the award be filed and made a decree of the Court after notice to the other parties and the arbitrators. Notice was issued to the other parties, and on 29th November 1905 two of the parties, one of whom is the present appellant, presented a petition praying that the award be not made a decree of Court but be set aside. Evidence was taken, and eventually the learned Judge decided that the respondents before him had not proved any misconduct of the arbitrators in consequence of which the award should be set aside under section 14 of the Act, and he ordered the award to be filed. The formal order following on the judgment does not purport to be a decree.

This procedure appears to be in accordance with the rules under the Act framed by the High Court of Calcutta except that the arbitrators ought to have requested that the award be filed. It is laid down in Rule VIII that the Registrar shall not file the award without an order of Court, to be obtained on the application of a party interested; in Rule IX that a petition by a party interested to file the award shall be registered as a suit; and in Rule X that if no ground be shown against the award the Court shall order it to be filed. In the Full Bench case

of *Janokey Nath Guha v. Brojo Lal Guha* (1), in which the question was whether an appeal lies from an order under section 526, Civil Procedure Code, directing the filing of an award, Mr. Justice Sale, who was one of the majority who held that an appeal lies, made some observations from which it would seem that on the Original Side of the High Court of Calcutta the practice is the same as that which existed before the Arbitration Act came into force, and that an order to file an award under that Act was regarded by him as on exactly the same footing as a similar order under the Code of Civil Procedure. At the same time it should be noted that in one sentence the learned Judge implies that the order to file the award is the decree, while in two other sentences I think he implies that the award itself is the decree.

But provisions similar to Calcutta Rules VIII, IX and X are not found in the rules of the High Courts of Madras and Bombay, nor in the rules of this Court. It seems to me very doubtful whether the Act contemplates an order to file the award being made by the Court in any case. Such an order is not specifically mentioned in the Act. Under section 11 (2) the duty of the arbitrators is not to apply to the Court to file the award, but to "cause the award to be filed in the Court," and the notice they are required to give to the parties is not a notice that they have applied, nor a notice that they have sent the award to the Court, but a "notice of the filing." This seems to imply that the award when received in the Court is to be filed at once without any order. The Act contains no provision for any of the parties applying to have the award filed. Section 15 states the consequence of an award on submission being "filed in accordance with the foregoing provisions." There are no foregoing provisions relating to filing except the provision in section 11 (2) that the arbitrators shall, on certain conditions being fulfilled cause the award to be filed.

The construction of the Act which I have just indicated would cause great difficulties in connection with limitation of applications under sections 13 and 14, and that costs a good deal of doubt on the point. I do not think it necessary to decide whether this construction is correct or not. Section 15 declares that an award on being filed shall be enforceable as if it were a decree of Court. Even if the correct procedure be for the Court to pass an order to file the award, it is plain that it is not that order, but the award itself, which is to be enforced as if it were a decree.

I need not speculate on the difficult questions, as to limitation and otherwise, which would arise if it were held that an appeal lies against the award itself. The words "as if it were a decree" are to my mind perfectly clear. Not only do they not indicate that the award is a decree. They indicate clearly that it is not a decree. If this view required any support it is to be found in section 6: "A submission, unless a different intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule, so far as they are applicable to the reference under submission." Clause VIII of the

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KHATOON  
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first schedule is this : "The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively."

Lastly, under section 2 of the Civil Procedure Code a decree is an adjudication in a suit or appeal only, not in any other proceeding. There is nothing in the Arbitration Act indicating that any proceeding under it is a suit or should be treated as such. Even if any such proceeding were a suit the award would not be an adjudication in such suit : it was made before the suit commenced, and was made out of Court. Under the Code of Civil Procedure no award has ever been held to be itself a decree : the Code provides for an order of the Court in every case, and it is that order which constitutes the decree. The Arbitration Act makes no express provision for any order to file the award, and it enacts expressly that the award itself shall be enforced as if it were a decree.

I would dismiss the appeal with costs.

*Ormond, J.*—I concur in thinking that no appeal lies. Under the Arbitration Act, no order of the Court, I think, is necessary for the filing of an award : and the order appealed against is in effect an order dismissing an application to set aside the award. Such an application is neither a suit nor an appeal : and there is nothing in the Arbitration Act to shew that it is to be treated as a suit ; the order therefore is not a "decree" within the meaning of the Code and appealable as such. Moreover, I think that the provisions of the Arbitration Act clearly indicate that an award, upon a submission which contains no provision to the contrary, is final ; unless the Court in which it has been filed remits it or sets aside. I think appeal should be dismissed with costs.

Civil  
1st Appeal  
No. 7 of  
1907.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge, and  
Mr. Justice Ormond.

March 30th,  
1908.

THE SOCIETA COLONIALE ITALIANA v. SHWE LE AND  
TUN BYU.

*Eddis*—for appellants (plaintiffs).  
*Agabeg*—for 1st respondent (defendant).  
*May Oung*—for respondents (defendants).

*Suit to establish right to attach Property—Right of suit independent of order on application for removal of attachment—Civil Procedure Code, s. 283.*

Independently of section 283 of the Code of Civil Procedure, a decree-holder who has attached property as being the property of his judgment-debtor, and whose right to do so has been disputed, may sue for a declaration that the property belonged to his judgment debtor.

*Raghunath Mukund v. Surosh K R. Kama*, (1898) I.L.R. 23 Bom., 266, referred to.

*Irwin, Officiating C.J.*—Plaintiffs-appellants obtained a money decree against first defendant on 10th March 1906.

On 20th March first defendant's land was sold by Government for arrears of revenue and was bought by second defendant.

It is alleged in the plaint that second defendant purchased the land on behalf of the first defendant, in order to evade attachment of the

same, and holds the land as trustee for the first defendant. Plaintiffs prayed that on payment of the arrears of revenue the sale be set aside, and for a declaration under Chapter VI of the Specific Relief Act that the land was the property of the first defendant and was held by the second defendant as trustee for the first defendant. There is another prayer which need not be noticed now.

The District Court held that the sale for arrears of revenue could not be set aside, and that decision is admittedly right; but the learned Judge held further that the suit was therefore barred. He did not consider the allegation that second defendant purchased on behalf of the first defendant.

It is admitted now that Chapter VI of the Specific Relief Act does not apply to the case, but it is argued that long before the suit was instituted, plaintiffs attached the land in execution of their decree, and the second defendant applied for removal of the attachment, but that application was adjourned pending the decision of this suit. That was a very unusual course to take, but I think there is no doubt that plaintiffs have a right of suit quite independent of section 383, Civil Procedure Code. That the person who claims to be the owner of attached property has such a right was laid down in *Raghunath Mukund v. Sarosh K.R. Kama* (1), and there is no reason why the decree-holder should not have a like right of suit provided he has attached the property and his right to attach it has been disputed.

The plaint is defective, as it contains no allegation of the attachment and the objection, but as the allegations in the plaint which I have set out above show clearly that plaintiffs' object was to vindicate their right to attach the property, I think an amendment of the plaint should be allowed now, all the more so as the second defendant actually suggested the issue: "Does the second defendant hold the said lands in trust for the first defendant?"

I would therefore set aside the decree of the lower Court, and direct that the plaintiffs be allowed to amend the plaint as indicated above, and that the Court do then proceed to determine the suit on the merits.

As plaintiffs not only claimed relief to which they were not entitled, but also omitted to state all the material facts which would entitle them to any relief, I would make no order for costs.

*Ormond, J.*—I concur.

*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.*

MAUNG PU }  
PO THAIK } v. KING-EMPEROR.

*May Oung*—for respondent and applicant.

*Custody of civil prisoner—Commitment of civil prisoner to jail—Wrongful confinement—ral order of Judge—Mistake of law—Mistake of fact—Civil Procedure Code, ss 478, 481—Indian Penal Code, ss, 78, 79, 344.*

A was arrested under section 578 of the Code of Civil Procedure. On his being brought before the Court, the Judge orally ordered the bailiff to keep him in

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COLONIALE  
ITALIANA  
v.  
SHWE LE.

*Criminal  
Revision  
Nos. 44B &  
70 B of  
1908.*

*April 3rd,  
1908.*

(1) (1898) I.L.R. 23 Bom., 266.

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MAUNG PU  
v.  
KING-  
EMPEROR.

custody. The bailiff in turn orally ordered a process-server to take charge of him, and this was done.

The bailiff and process-server were subsequently prosecuted and convicted, under section 334 of the Indian Penal Code, of wrongful confinement.

*Held*,—that section 78 of the Indian Penal Code does not extend to the oral order of a Judge, that as section 481 of the Code of Civil Procedure only authorises a Judge to commit persons to jail; the mistake of the bailiff and the process-server, in believing that their oral orders justified their action, was purely a mistake of law and not of fact; and that therefore they were rightly convicted.

One Nawana Mainandi was arrested before judgment on a warrant issued under section 478 of the Civil Procedure Code, and was brought before the Judge of the Township Court. The Judge did not issue any committal warrant, but orally ordered the bailiff, Maung Po Thaik, to keep him in custody. The bailiff gave his prisoner in charge to process-server Maung Pu, with oral orders to detain him. Maung Pu detained him in his own (Maung Pu's) house from 26th June to 18th July, and he was then released by order of the Deputy Commissioner, on complaint made by Nawana's wife.

The bailiff and process-server were prosecuted and convicted of wrongful confinement under section 344, Penal Code. They were sentenced to imprisonment until the rising of the Court, and were fined; the bailiff Rs. 60 and the process-server Rs. 10.

The bailiff appealed to the Sessions Judge, who dismissed the appeal, rightly holding that section 78, Penal Code, does not extend to the oral order of the Township Judge. The learned Judge remarked that the Township Judge and the bailiff both erroneously supposed that the warrant of arrest justified the further detention of the man after he had been brought before the Court. He said that the fault of the bailiff was utterly venial in comparison with the fault of the Township Judge, and he recorded an opinion that the conviction of the appellant constituted no reason why he should not be reinstated as bailiff, but if he offended in the same way again he would deserve a substantial term of imprisonment. Maung Po Thaik has in fact been reinstated.

The process-server also appealed to the Sessions Judge. The sentence was not appealable. The Sessions Judge has submitted the record to this Court in revision, with an expression of opinion that the conviction was wrong, because as a process-server Maung Pu would naturally make the *mistake of fact* of supposing that the openly conveyed oral orders of the Judge and bailiff were legal.

The bailiff then applied to this Court for revision of the order dismissing his appeal, on the ground that the reasons which the Sessions Judge gave for thinking that Maung Pu was not guilty apply with equal force to him.

I am unable to see any distinction between the case of the bailiff and that of the process-server. The Sessions Judge has found that each of them believed he was acting legally in obeying an oral order of the Township Judge, but says that Maung Pu, as a process server, would naturally make the mistake. I suppose this implies that Maung Po Thaik, as a bailiff, would naturally make the mistake because he would have more knowledge of law. Whether this be so

or not seems immaterial, in view of the finding that not only the bailiff but the Judge did in fact make the mistake.

I am unable to agree with the Sessions Judge that Maung Pu's mistake can in any sense of the word be called a mistake of fact. The law as laid down in section 481 of the Civil Procedure Code is that the Court may commit the defendant *to jail*, and the form of order for committal is prescribed in the fourth schedule, No 159. Any mistake that the Judge, bailiff and process-server made was ignorance of the law as so laid down. This is a pure mistake of law and not of fact. Therefore section 76 of the Penal Code does not protect them.

I decline to interfere with the conviction of Maung Pu and I dismiss the application of Maung Po Thaik.

*Before Mr. Justice Moore.*

(Original Civil Jurisdiction)

SAMUEL BALTHAZAR—PETITIONER.

In the Matter of the Estate of David Nicolson and Charlotte Shaw Nicolson, both deceased.

*Okeden*—for petitioner.

*Court-fee on letters of administration de bonis non—Court-fees Act, 1870, s. 19 C.*

When court-fees have once been paid on the value of the whole of an estate in respect of which letters of administration have been granted, no further court-fees is leviable on a subsequent grant of letters of administration under section 229, Indian Succession Act, in respect of an unadministered portion of the estate, even though the value of the property has increased in the meanwhile.

In 1883 when probate was granted to Charlotte Shaw Nicolson the property in respect of which letters are now asked for was included in the schedule.

In Civil Miscellaneous No. 55 of 1902, the executrix Charlotte Shaw Nicolson having died, her daughter Charlotte Shaw Adam took out letters of administration *de bonis non*. The two lots in Strand Road were both included. They were valued at Rs. 25,000 and court-fees were paid on Rs. 53,000 including this property. The present application is for letters *de bonis non* in respect of a portion of the sale-proceeds of the same two lots of land in Strand Road, the portion of the sale-proceeds being Rs. 1,34,500.

Mr. Okeden claims that under the provisions of section 19C, Court-fees Act, no further court-fee is chargeable.

Letters of administration have previously been issued in respect of the whole of the property in respect of which letters are now asked for. The full fee chargeable on the property at the value there placed upon it was levied. The property has since apparently risen in value. I am of opinion that this cannot affect the question. The full fee chargeable was paid when letters were previously issued. Consequently no fee is leviable now in spite of the rise in value.

I therefore decide that no further court-fee is leviable in respect of the present grant of letters. Letters will issue on security being furnished.

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EMPEROR.

Civil  
Miscellaneous  
No. 156 of  
1907.

December  
2nd,  
1907.

Civil 1st  
Appeal  
No. 1 of  
1907.

February  
13th,  
1908.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

MA NYO AND FIVE OTHERS v. MA YAUk.

Higinbotham—for appellants (defendants). Eddis—for respondent (plaintiff).

Buddhist law; Inheritance—Interest of widow in property inherited by husband during marriage—Inherited property—Ancestral property—Widow's share of joint property—Preliminary order before completion of evidence—Judgment—Change of Judge—Findings of predecessor—Civil Procedure Code, ss. 191, 198.

The interest of a widow of Burman Buddhist in property inherited by him during their marriage, when children of the marriage also survive, is the same as her interest in her deceased husband's share of the property jointly owed by him and her. The property descends to the children, but she has a life interest in it, with the right to sell it in case of necessity.

The suit was tried in the District Court partly by one Judge and partly by another. In a preliminary order the first Judge came to certain findings, and directed that after evidence on certain points have been taken, the final decree should take a certain shape. The Judge who finished the case varied certain of his predecessor's findings in the final judgment.

Held, *per Fox, C.J.*,—that the first Judge had no authority to give judgment before the completion of the evidence, and it was for the second Judge to give the judgment on which the decree should be based, and open to him to deal with the whole case.

*Per Hartnoll, J.*,—that the order of the first Judge did not have the force of a decree, and that the decree of the second Judge which decided the suit was the decree that was appealable.

*Maung Te v. Ma Kyu*, (1900) 2 Chan Toon's L.C., 95; *Maung Waik v. Maung Nyein*, (1899) 2 Chan Toon's L.C., 77; *Ma On v. Shwe O*, (1886) S.J., L.B., 378; *Shwe Yo v. Mi San Byu*, S.J.L.B., 108; *Maung Gale v. Maung Bya*, 4 L.B.R., 189; referred to.

*Fox, C.J.*—The plaintiff respondent sued the defendants-appellants as heirs and legal representatives of their mother, Ma Baik, and personally for recovery of what was due for principal (Rs. 5,000, and interest due on a mortgage by Ma Baik of eleven plots of land, a house, and some cattle and the standing crop of the lands. The defendants' father's name was Maung Myaing, and his parents' names were U Po Gyok and Ma or Daw U. U Po Gyok predeceased Ma U, and it is admitted that Ma U predeceased Maung Myaing.

The defendants did not admit that Ma Baik had executed the mortgage. They set up that five of the plots of land had been inherited by their father, and that they had inherited those properties from him, and that another plot, No. 5 in the list, had also been inherited from Ma U, and that it had been given by her heirs to the third defendant, Maung Po Yin.

Captain Nethersole, the District Judge who first dealt with the case framed the following issues:—

- (1) Did Ma Baik execute the mortgage deed sued upon?
- (2) Had Ma Baik power to make a valid mortgage of the land in suit? If not of all, then of what part of it (if any)?
- (4) Was the money which was raised on the mortgage raised for the purpose of paying off debts due by the estate of her late husband Maung Myaing?



- (4) Did the property in question, with the exception of holding No 5, come into the defendants' hand by way of inheritance?  
(5) Was holding No. 5 transferred by way of gift to the defendant No. 3 by the heirs of U Po Gyok and Ma U?

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On the first issue he held that it had been proved that Ma Baik had executed the mortgage deed sued upon.

On the second issue he found that Ma Baik had the right to mortgage the properties which had been owned by Maung Myaing and herself jointly to the extent of her undivided half share of it, and that she had the right to mortgage Maung Myaing's separate property to the extent of Rs 1,015 only.

On the third issue he held that of the money raised on the mortgage Rs. 2,029-14-0 was to pay a debt jointly due by Maung Myaing and herself.

On the fourth issue he held that the properties had come to the defendants' hands by way of inheritance, but holding No. 5 had not been identified and further evidence as to it should be called before a decree could be made.

On the fifth issue he held that a piece of land had been given to the third defendant, but the identity of this land with holding No. 5 had to be established.

Towards the end of his judgment he said, "It is, I consider, indispensable to call for evidence showing the source from which each piece of land of those in the schedule came into the defendants' hands, and which is Maung Yin's. When this shall have been done there will be a decree given to the plaintiff for the amount then found due on the mortgage, and declaring that she has a lien on the mortgaged property with the exception of Maung Po Yin's holding, and with the reservation that the land inherited from Daw U shall not be liable for any greater sum than Rs. 1,015, and interest at the contract rate on that sum, and that of the rest only Ma Baik's undivided half share shall be liable for the remainder of the debt."

Before the further evidence was taken, Captain Nethersole was succeeded by Mr. Heald, who proceeded to deal with the case under section 191 of the Code of Civil Procedure. He held that holding No. 5 was not included in the mortgage. He found that all the other plots of land and the other property mentioned in the mortgage property had been Maung Myaing's and Ma Baik's joint property with the exception of plots Nos. 2, 3, 4 and 7 in the schedule to the plaint, and that these last-mentioned plots had been inherited by Maung Myaing from his mother Ma U, and had been his separate property.

Mr. Heald differed from Captain Nethersole as to the separate property being liable for a certain amount only. He held that Maung Myaing's estate to which Ma Baik and the defendants succeeded comprised both the joint and the separate properties. He also held that Ma Baik when she executed the mortgage acted on behalf of her

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children as well as on her own account, and consequently the mortgage was binding on the whole estate to the full amount of Rs. 5,000, principal and the interest due thereon.

On appeal to this Court it was urged that Mr. Heald had no authority to go behind and differ from the findings of his predecessor. If Captain Nethersole had authority to give judgment in the case when he did, this would be so, for the decree must follow and agree with the judgment. Captain Nethersole's judgment, however, was given at a stage of the case when a decree could not be made, owing to the evidence not being complete. The Code nowhere contemplates a judgment in a suit being given before a decree or what is included in the definition of "decree" can be drawn up according to it. Section 198 lays down that judgment is to be pronounced in a suit after the evidence in it has been taken and after the parties have been heard. Section 154 is the only section under which a judgment may be given possibly without taking all the evidence which the parties may wish to put before the Court. Under this section, if the decision on one issue will be sufficient for the final decision and disposal of the suit, judgment may be delivered, and such judgment will conform with the requirements of section 204.

Captain Nethersole's findings on the issues were premature, and unauthorized at the stage of the case at which they were pronounced. It was open to Mr. Heald therefore to deal with the whole case, and it was for him to give the judgment on which the decree had to be based. For these reasons the second ground of appeal to this Court must, in my opinion, fail.

Upon the evidence in the case it is clear that Ma Baik executed the mortgage sued on, and that she received Rs. 5,000 from the plaintiff. It is also clear that with this money she paid off a debt of Rs. 2,029-14-0 due by Maung Myaing and herself jointly. The joint and the separate property of Maung Myaing was clearly liable for this amount. His heirs, whoever they were, succeeded to his property subject to that property being liable for payment of his debts. As regards the balance of the principal sued for, the defendants cannot be liable except to the extent of any property of Ma Baik which has come to their hands respectively. The mortgage is not expressed to have been made by Ma Baik as guardian of her children, and no presumption can be drawn that she was acting as such when she took the money and executed the mortgage deed. It is not proved that the money was borrowed to meet the necessities of the family. It appears to have been applied to paying off her own debts and in extravagance in *shinbyu* ceremonies for her children.

The question remains whether the defendants inherited any part of the separate property of Maung Myaing through Ma Baik, that is to say, whether Ma Baik succeeded to an absolute estate in Maung Myaing's separate property or in any part thereof, to which the defendants have succeeded as her heirs. If Maung Myaing had died before his mother Ma Baik would not have succeeded to any share in

Ma U's property—see *Maung Te and others v. Ma Kyu and others* (1). He survived Ma U and became entitled to his share in her estate, and the property which he succeeded to became his property. If at his death no child of his had survived, Ma Baik as his widow would have succeeded to the whole of such separate property—see *Maung Waik v. Maung Nyein* (2). I cannot find that it has been as yet laid down in any published report what share and what estate the survivor of a married couple takes in the separate property of his or her deceased spouse when children of the marriage also survive. In *Ma On v. Shwe O* (3) it was settled that a widow according to the Burmese Buddhist law of inheritance has an absolute interest in half of the property which had been jointly owned by her deceased husband and herself, and that in the remaining half she has only a life interest with power of selling it in case of necessity, but the eldest child is entitled to his or her share (a quarter) in the whole property if he or she chooses to demand it.

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—

In connection with this judgment I take it that it was not meant to be laid down that the widow succeeds to her absolute half share as an heir of her husband. She was entitled to such share of the joint property during the joint lives of herself and her husband, and naturally that share remains hers after his death. So far as her husband's half share in the property is concerned, she becomes entitled on his death to a life estate in it, and to the power of selling it to meet the necessities of the family, subject to the eldest child's right to claim a quarter share.

In the absence of any texts which show decisively that a widow takes a different estate in her husband's separate property when children of the marriage survive their father, I would hold that she takes the same estate in such separate property as she takes in her husband's share of the joint property, *i.e.*, a life estate with a power of sale in case of necessity.

In my opinion the mortgage sued on was a valid mortgage, for Rs. 2,029-14-0 and interest, of all the properties described in the schedule to the plaint. It operated also as a mortgage of Ma Baik's half share in the quondam joint property of herself and Maung Myaing for the full amount of Rs. 5,000 and interest. Mr. Heald held that plots Nos. 2, 3, 4 and 7 in the schedule to the plaint had been the separate property of Maung Myaing, and that all the other properties (apart from plot 5) had been joint property. These findings have not been contested in appeal.

I think the decree of the District Court should be set aside and that a mortgage decree should be made by this Court declaring that the plaintiff has a mortgage lien on all the properties set out in the list of properties in the mortgage deed for Rs. 2,029-14-0 and interest thereon at the mortgage rate up to the date of the decree, and that she has a mortgage lien for the total amount due to her on the

(1) (1900) 2 Chan Toon's L.C., 95. | (2) (1899) 2 Chan Toon's L.C., 77.  
(3) (1886) S.J., L.B., 378.

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mortgage, namely, Rs. 5,000 and interest thereon at the mortgage rate up to the date of the decree on Ma Baik's half share in the properties described in the list of properties in the mortgage deed other than the 2nd, 3rd, 4th, and 7th properties in the said list; and ordering the defendants as legal representatives of Ma Baik to pay out of the property of Ma Baik which has come to their hands respectively such principal sum of Rs. 5,000 with interest thereon at the mortgage rate up to the date of the decree, and the costs of the suit and interest on the total of such amounts at the rate of six per cent. per annum from the date of decree until realization; and directing that if the decree is not satisfied within six months of its date the half share of Ma Baik in the properties other than the 2nd, 3rd, 4th, and 7th in the list shall first be sold, and the proceeds applied to satisfaction of the decree, and that if the decree is not satisfied by such proceeds, sufficient of the remaining properties in the list be then sold, for the purpose of discharging the balance of the amount due under the decree, up to a limit of Rs. 2,029-14-0 with interest thereon at the mortgage rate up to the date of decree.

The defendants having been only partially successful in this appeal, I would order that the parties bear their own costs of it.

*Hartnoll, J.*—Ma Yauk sues Ma Nyo and five others, the children of Maung Myaing and Ma Baik both deceased, to recover the sum of Rs. 6,025 due upon a mortgage deed with such further interest as may accrue between the filing of the plaint and the day of payment and in addition asks for a mortgage decree. The District Court granted the decree asked for, and against this decree the present appeal has been filed. In the lower Court the genuineness of the mortgage deed was disputed, but the point was given in disfavour of the appellants. The first ground of appeal seems to have been framed with a view to again disputing that the mortgage existed; but at the argument it was allowed that the mortgage deed sued on was entered into by Ma Baik.

The next ground of appeal is one of law. The suit was tried in the District Court partly by one Judge and partly by another. In a preliminary order the first Judge came to certain findings and directed that after certain evidence had been taken with regard to the mortgage lands the final decree should take a certain shape. The Judge who finished the case disagreed with his predecessor and gave a different decree to that ordered by the first Judge. It is argued that he could not do so and that, as the directions of the first Judge were not followed in granting the final decree, and as no appeal nor application for review has been laid against the decree ordered by the first Judge, the decree as ordered by the first Judge must now stand. The ground should not in my opinion prevail. The order of the first Judge did not in my opinion have the force of a decree. The first Judge stated that further enquiry was necessary before a decree could be given in accordance with his findings, and it cannot be said that the first Judge's order decided the suit. Something further had to be done before the suit could be finally decided. In the interval another

Judge came who differed with certain findings of the first Judge and who gave a decree different to that which the first Judge ordered to be given in the future. This decree decided the suit, and it seems to me that this is the decree appealable and not the order of the first Judge directing that after further enquiry a decree should be given in a certain manner.

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The next ground of appeal is that it was not proved that the money was borrowed for necessities, and so the lower Court should have held that the mortgage of at least the share of the appellants was invalid and void. To examine the ground it is necessary to set out some of the facts. The parents of the appellants were U Myaing and Ma Baik. The parents of U Myaing were U Po Gyok and Daw U. The mortgaged property consisted of eleven pieces of land, a house, 5 bullocks, 13 buffaloes and the produce of the paddy land. From the evidence it appears that some of the lands were the joint property of Maung Myaing and Ma Baik, while some of them descended by inheritance from Daw U. There is no evidence to show whether the house and cattle descended by inheritance, or whether they were the joint property of Maung Myaing and Ma Baik. When Ma Baik made the mortgage to Ma Yauk, Maung Myaing was dead, and all her and Maung Myaing's children, with the exception perhaps of Ma Nyo were minors. It is clear that she could not mortgage her minor children's share in their inheritance except in case of necessity, and as authority for this view I would refer to the case of *Ma On v. Shwe O* (3). Further it seems to me that the burden of proof as to necessity rests on Ma Yauk, and in support of this opinion I would quote the case of *Shwe Yo v. Mi San Byu* (4) where the same opinion was expressed as to the burden of proof.

Turning to the evidence it appears that Maung Myaing left behind him a certain debt, which was satisfied by the payment of Rs. 2,029-14-0 by Ma Baik out of the Rs. 5,000 raised on mortgage from Ma Yauk. This sum would certainly seem recoverable by Ma Yauk from such of the mortgaged property as Maung Myaing and Ma Baik had an interest in jointly or severally, as it was paid to satisfy a debt left by Maung Myaing for which Maung Myaing's estate would have been liable. It appears that another portion of the Rs. 5,000 was appropriated to pay off another debt incurred by Ma Baik on the signatures of Ma Nyo, Ma Kyaw and Ma Thaw. There is nothing to show that this debt was incurred as necessary on behalf of the children, and as regards it, it seem to me that the children's interest in the mortgaged property should not be bound to contribute. A third portion of the Rs. 5,000 from the evidence was paid to pay off a debt of Rs. 1,200 incurred by Ma Baik to *shinbyu* three of the children. It seems to me to have been a most extravagant proceeding to have spent so much on the *shinbyus*, considering the value of the estate as it appears on the record and that it was already liable for a debt left by Maung Myaing. I am of opinion that this expenditure cannot be classed as necessary on behalf of the

(4) S.J., L.B., 108.

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children and that it should have been met from current earnings or rents of the land, and I would not make the children's share of the estate contribute towards its satisfaction. In other words, Ma Yauk should have no lien on the mortgaged lands, so far as the children's share is concerned for the recovery of the sum of money that was paid to extinguish this third debt.

The fourth ground of appeal is that the District Judge erred in law in holding that Ma Baik had any right or title to the properties inherited by her husband Maung Myaing from his parents. It is admitted that Daw U died a month before Maung Myaing. Ma Baik was therefore alive when he inherited from Daw U and consequently she was within reach of the inheritance. The point for consideration is whether, according to Buddhist law, the inherited property of Maung Myaing should devolve differently to his share of the jointly acquired property of himself and Ma Baik. I have discussed the distinction between the two sorts of property in the case of *Maung Gale v. Maung Bya* (5); and have examined the Digest so as to see whether in the present case there is any well-defined rule laid down. Section 44 of the Digest discusses the division of property between the mother and children on the death of the father. No well-defined rule with regard to separate inherited property seems to be laid down there. The only case that counsel referred to was that of *Maung Te v. Ma Kyu* (1), and that case is not applicable here in that Maung Myaing survived Daw U. In the absence of well-defined authority I am of opinion that the rule for the devolution of property inherited by Maung Myaing from Daw U should be considered to be the same as that which is applicable to the share of Maung Myaing in the jointly acquired property of himself and Ma Baik, which is that it should descend to the children subject to a life interest in it by Ma Baik and subject to the latter having had a power of sale over it in case of necessity.

The findings of Mr. Heald as to what was the property inherited by Maung Myaing have not been dissented from.

For the above reasons I concur in the decree proposed to be passed by the learned Chief Judge.

Civil 2nd  
 Appeal  
 No. 133 of  
 1907.

Before Mr. Justice Har/noll.

PO HLAING v. MA O.

February  
 20th, 1908.

Sealy—for appellant (plaintiff). | Maung Kin—for respondent (defendant).

*Pauper respondent raising objection to decree on appeal—Memorandum of objection in formâ pauperis—Provisions for pauper appeal—Civil Procedure Code, s. 561, Chap. XLIV.*

A plaintiff who has obtained leave to sue in formâ pauperis, and has been successful in obtaining a decree for a portion of his claim but has failed as to the remainder, may be allowed, under section 561 of the Code of Civil Procedure, to take in formâ pauperis any objection to the decree which he could have taken by way of appeal. The provisions of Chapter XLIV of the Code, so far as they can be made applicable, now apply to an objection under this section.

*Babaji Hari v. Rajaram Ballal*, (1875) I.L.R. 1 Bom., 75; *Narayana v. Krishna*, (1889) I.L.R. 8 Mad., 214; *Brojeshwari Dasi v. Guroo Ghurn Dass*, (1885) 11 L.R., 11 Cal., 735; distinguished.

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Maung Po Hlaing sued Ma O as a pauper to recover from her property valued at Rs. 2,808-8-0. He obtained a decree for cash Rs. 525 and also for a cart which was an article sued for. Ma O appealed against this decree, whereupon Maung Po Hlaing filed objections under section 561 of the Civil Procedure Code claiming the rest of the property which he sued for and his claim to which was dismissed by the Court of first instance. The Judge of the Divisional Court refused to hear Maung Po Hlaing on his objections on the authority of the following cases: *Babaji Hari v. Rajaram Ballal* (1), *Narayana v. Krishna* (2), and *Brojeshwari Dasi v. Guroo Churn Das* (3). The present appeal has accordingly been laid that the Divisional Court was wrong in its procedure. Section 561 of the Code of Civil Procedure as it now stands is different to the section as it stood when the decisions relied on by the Divisional Court were passed in that it was amended by section 48 of Act VII of 1888 to its present form. In the section as it originally stood there was nothing making the provisions of Chapter XLIV of the Code applicable to objections filed in accordance with it; but when it was amended the provisions of Chapter XLIV were, so far as they could be made applicable, made to apply to an objection filed in accordance with it. It may be that the change in the law was made consequent on the decisions quoted by the Divisional Court. I am therefore of opinion that the Divisional Court erred in refusing to apply the provisions of Chapter XLIV so far as they can be made applicable to the objection.

The decree of the Divisional Court is therefore set aside, and it is decreed that that Court do reopen the appeal, and proceed to consider the objections in the manner laid down by section 561 of the Code, in the first place applying the provisions of Chapter XLIV to them so far as they can be made applicable, and, in the event of its allowing Maung Po Hlaing to object as a pauper, in the second place coming to findings on the objections and passing such final decree as may be correct and suitable. The costs of this appeal will follow the final result of the appeal.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.

P. L. A. N. ALLAGAPA CHETTY AND SAN KYU  
v. NAZAMAT ALI CHOWDRY.

Fagan—for appellants (defendants).

Suit for declaration of title in attached property—Bar to suit—Consequential relief—Civil Procedure Code, s. 278—Specific Relief Act, 1877, s. 42.

Civil 2nd  
Appeal  
No. 49 of  
1908.

May 8th,  
1908.

The proviso to section 42 of the Specific Relief Act does not apply to a suit for a declaration that the property attached and sold in execution of a decree is the property of the plaintiff, even though no application for removal of attachment had been made under section 278 of the Code of Civil Procedure.

(1) (1875) I.L.R. 1 Bom., 75. (2) (1884) I.L.R., 8 Mad., 214.  
(3) (1885) I.L.R., 11 Cal., 735.



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*Sevaraman Chetty v. Maung Po Yin*, 1. L.B.R., 1; *Kya Get v. Bu Nwe*, 4 L.B.R., 88; *Supal Panday v. Sukkhu Koiri*, 4 L.B.R., 75; referred to.

The suit was merely for a declaration that certain land attached and sold in execution of a decree at the instance of the defendant was the property of the plaintiff and not liable to attachment.

It is not stated in the judgment whether any application to remove the attachment had been made under section 278 of the Code of Civil Procedure, but the learned advocate states that no such application had been made, and I take that to be the fact.

The ground of appeal which was argued was that the suit is barred by the proviso to section 42 of the Specific Relief Act because the plaintiff asked for nothing more than a declaration.

It is admitted that this objection could not prevail if the suit were one under section 283 of the Code of Civil Procedure, *Sevaraman Chetty v. Maung Po Yin* (1) and *Kya Get v. Bu Nwe* (2); but Mr. Fagan urges that because no application for removal of attachment was made, therefore the suit is of a different nature, and the proviso to section 42 of the Specific Relief Act applies. I am unable to see the distinction. If an application for removal of attachment had been made, the suit might be in form one to set aside the summary order refusing to remove the attachment, but in substance it would be one to establish the plaintiff's right to the property. These are the words of section 283. The present suit is also one to establish the plaintiff's right to the property. I can see no reason for making any distinction between the mode in which plaintiff must establish his right if he has previously applied for a summary order and the mode in which he must establish his right if he has not applied for a summary order. In either case a declaration is sufficient. When plaintiff obtains a declaration, the Court which executed the decree must respect the declaration and give restitution. In *Supal Panday v. Sukkhu Koiri* (3), the plaintiff made an application under section 278, but withdrew it, and then instituted a suit for a declaration only. It was expressly admitted that such a suit would lie if no application under section 278 had been made. The head-note of the report in that case is incorrect. I do not regard that as a strong precedent because the appeal proceeded on a different ground. But I am satisfied that the proviso to section 42 of the Specific Relief Act does not apply to this case.

The object of the proviso is to prevent a plaintiff from getting a declaration in one suit, and consequential relief afterwards in another. Here there is no need for any subsequent suit. The relief must be given by the Court which sold the land in execution.

The appeal is dismissed under section 551 of the Code of Civil Procedure.

(1) 1. L.B.R., 1. (2) 4 L.B.R., 88.  
(3) 4 L.B.R., 75.

Before Mr. Justice Moore.

KING-EMPEROR v. MAUNG KA.

Young, Government Advocate—for King-Emperor.

Lambert—for respondent.

Criminal  
Revision  
No. 77B of  
1908.

May 29th  
1908.

*Power of Local Government to specify Court of trial of public servant—Local jurisdiction—Magistrate—Criminal Procedure Code. 1898, ss. 197, 527.*

The Local Government, acting under section 197 of the Code of Criminal Procedure, sanctioned the prosecution of A, a public servant for an offence committed in Upper Burma, and specified the Court of a Magistrate in Lower Burma as that before which the trial was to be held.

*Held*,—that the Magistrate so specified had power to take cognizance of the offence, although it was alleged to have been committed within the local jurisdiction of the Judicial Commissioner of Upper Burma, while the Magistrate's own jurisdiction was within the limits of the jurisdiction of the Chief Court of Lower Burma.

*Queen-Empress v. Samavir*, (1893) I.L.R. 16 Mad., 468; *Po Wa v. King-Emperor*, Criminal Revision No. 787 of 1905 (unreported): referred to.

This is an application for revision of the order of the Subdivisional Magistrate, Myedè Subdivision, refusing to receive a complaint presented by the Government Advocate, Mandalay.

It appears that the Local Government in their order in the Appointment Department No. 7C.-34, dated the 16th December 1907, under section 197 of the Criminal Procedure Code, sanctioned the prosecution of Maung Ka, a Myoök, for offences under sections 161, 164, Indian Penal Code. These offences are said to have been committed in Upper Burma within the local jurisdiction of the Judicial Commissioner, Upper Burma. Under the provisions of the second paragraph of section 197, the Local Government specified the Court of the Subdivisional Magistrate, Myedè, as the Court before which the trial was to be held. Myedè Subdivision is within the limits of the jurisdiction of this Court, and the Subdivisional Magistrate has refused to receive the complaint on the ground that he cannot have any jurisdiction to try or to take cognizance of offences committed in Upper Burma.

I have been referred to the case of *Queen-Empress v. Samavir* (1) and to *Po Wa v. King-Emperor* (2), but neither of these cases appear to me to throw any light upon the question.

Section 527, Criminal Procedure Code, has been quoted both in the Subdivisional Magistrate's Court and before me. But that section deals with the transfer of cases, not with their initiation.

A Magistrate can take cognizance of offences which he is competent to try subject to the provisions of section 177, Criminal Procedure Code. That section directs that "ordinarily" an offence shall be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed. The use of the word "ordinarily" indicates that this rule is to be read subject to any special provisions of law which may modify it, and the rule is relaxed or modified in several of the succeeding sections of the Code. And I think that this

(1) (1893) I.L.R. 16 Mad., 468. | (2) Crim. Rev. No. 787 of 1905 (unreported).

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section must be read as subject to the special provision of section 197, clause (2). It was admitted before me by respondent's advocate that the Local Government could have legally and validly specified any Court in Upper Burma irrespective of local jurisdiction to try these offences. It would be difficult to maintain the contrary. But this shows that the power given in 197 (2) overrides the general rule contained in section 177. If section 177 has no application, is there any other provision of the law which would limit the Local Government in its choice of the Court of trial to a Court in Upper Burma? I can find no such provision. In my opinion the Local Government was entitled to specify any Court for the trial irrespective of jurisdictions, and the Magistrate erred in holding that he had no power to receive the complaint.

I therefore set aside the order of the Subdivisional Magistrate declining to receive the complaint, and direct him to receive the complaint and proceed with the trial of the case according to law.

### Privy Council.

(On appeal from the Chief Court of Lower Burma.)

March 18th,  
1908.

Before Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and  
Sir Arthur Wilson.

T. P. PETHERPERMAL CHETTY (1ST DEFENDANT)—APPELLANT.

v.  
R. MUNIANDY SERVAI ... PLAINTIFF  
R. M. A. R. L. MUTHIA CHETTY } 2ND AND 3RD  
S. P. R. M. P. CHINNIA CHETTY } DEFENDANTS. } — RESPONDENTS.

*Benami sale to defraud incumbrancer—Failure of fraudulent object—Right of owner to recover possession from benami purchaser—Limitation of suit to recover possession without setting aside void instrument—Inoperative instrument—Indian Limitation Act, Schedule II, Articles 91, 144.*

A executed a *benami* deed of sale of certain land to B, to defeat the claims of X, who held a mortgage of the land. X sued A for the amount of the mortgage-debt, and succeeded, having proved that the deed of sale was without consideration, and that at the time of its execution B was aware of the existence of the mortgage. The land, however, remained in B's possession.

Subsequently A sued B for possession of the land.

*Held*,—that in spite of A's attempt to defraud X by the deed of sale, he was entitled, as the fraud had failed, to recover possession of the land from B.

*Held further*,—that the *benami* deed of sale being inoperative, it was not necessary that it should be set aside as a preliminary to obtaining possession of the land. The suit was therefore governed not by article 91, but by article 144 of the Second Schedule to the Limitation Act.

*Taylor v Bowers*, Q.B.D., 291; *Symes v. Hughes*, L.R. 9 Eq., 475, at p. 479; *In re Great Berlin Steamboat Co.*, L.R. 26 Ch.D., 616, followed.  
*Kearly v. Thomson*, 24 Q.B.D., 272, referred to.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side.

The judgment of their Lordships of the Privy Council was delivered on the 18th March 1908 by—

*Lord Atkinson*.—In this case an action was originally brought by R. Muniandy Servai, claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandy

Maistry, against T. P. Petherpermal Chetty, the uncle and predecessor of the appellant (hereinafter called "Petherpermal the elder"), and two formal defendants, R.M.A.R.L. Muthia Chetty and P.R.M.P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government Waste Land No. 1, situate in Tamanaiing Circle, Kungyangôn Township, Hanthawaddy District, Lower Burma. One Arunachellam Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568-12-0.

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SERVAI.

On the 11th June 1895, Chellum Servai executed a deed purporting to be a conveyance on sale of the abovementioned lands to Petherpermal Chetty the elder, a money-lender, residing in Rangoon, in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On the 18th September 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry, deceased, and Petherpermal the elder, in which he alleged that at the time of the execution of the abovementioned conveyance Petherpermal the elder was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last-mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568-12-0, with interest, and other relief.

Petherpermal the elder filed his defence, and, the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellam Chetty for debt and costs, and as security for this loan he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear that, whatever may have been the design to effect which the deed of the 11th June 1895 was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt, together with the costs of the litigation which he successfully prosecuted, and if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On the 30th July 1897, R. Muniandy Servai and Petherpermal the elder executed a deed of release by which the form released all his

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interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case, that the deed of the 11th June 1895 was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was "a *benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Lower Burma on appeal upheld that decision.

It was not pressed in argument by counsel on behalf of the appellant that, on an issue of fact such as this, the finding of the Judge who tried the case and saw the witnesses, approved, as it was, upon appeal, should under the circumstances of the case be disturbed. The only questions, therefore, for their Lordships' decision are—

1. Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?
2. Is his right of action barred by the 91st article of Schedule II to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th ed., p. 595, paragraph 446), the result of the authorities on the subject of *benami* transactions is correctly stated thus :—

446. . . . . Where a transaction is once made out to be a mere *denami* it is evident that the benamidar absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that B has assumed the name of A in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded anyone, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property which they had assigned away

where they had intended to defraud creditors, who, in fact, were never injured. . . . But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, *In pari delicto potior est conditio possidentis*. The Court will help neither party. Let the estate lie where it falls.

Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law, if the maxim

*in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced if debtors who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property into the possession of which he was so unrighteously and unwisely put.

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The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same possession as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor v. Bowers* (1) and the authorities upon which that decision is based clearly establish this. *Symes v. Hughes* (2) and *In re Great Berlin Steamboat Co.* (3) are to the same effect. And the Authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry, L.J., in *Kearley v. Thomson* (4).

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case if anything be done or any step be taken to carry out the arrangement, such as, on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, article in

(1) Q.B.D., 291.

(2) L.R. 9 Eq., 475, at p. 179.

(3) L.R. 26 Ch.D., 616.

(4) 24 Q.B.D., 742.

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the second schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Criminal  
Revision  
No. 30B of  
1908.

March 27th,  
1908.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.

V.N. RAMASAWMY PILLAY v. A. AMANADAR.

A. B. Banurji—for applicant. | Respondent in person.

*Breach of contract—Employer's right to repayment of advance—Order subsequent to expiry of term of contract—Workman's Breach of Contract Act, 1859, s. 2.*

A obtained an advance from B and signed an agreement to work for him for one year. He absconded, however, after working for 15 days only. B applied for a warrant under section 2 of the Workman's Breach of Contract Act, within a month of the expiry of the term of the contract. At the instance of the respondent's pleader, the case was adjourned to the last day of the period of contract and was then dismissed on the ground that no order could be made after the expiry of the contract.

*Held*,—that the delay in the disposal of the case did not defeat B's right to compel the refund of the money advanced.

*Khola Buksh v. Moti Lal Johori*, (1906) 11 C.W.N., 247, dissented from.

On 7th January 1907 the respondent received an advance from petitioner, and signed an agreement to work for him up to 8th January 1908.

On 20th December 1907 petitioner applied to the Magistrate for a warrant under section 2 of Act XIII of 1859, alleging that respondent had worked for only about 15 days and had subsequently absconded, and petitioner had "now" learned where he was hiding.

The warrant was issued the same day, and the case fixed for 30th December, but on that day it was adjourned to 7th January at the request of the respondents' pleader. On 8th January the case was dismissed on the ground that no order could be made after the expiry of the term for which the respondent had engaged to work.

This decision was based on the ruling of the Calcutta High Court in *Khola Buksh v. Moti Lal Johori* (1). In that case the term of the contract was for three years, ending 22nd July 1906. The Magistrate issued summons on 16th February 1906. The workman did not obey the summons, but moved the High Court on 3rd June. A rule was granted, which did not come on for hearing until 3rd September, and the rule was made absolute on the ground that the three years had then expired. It does not appear from the report what the exact terms of the rule were, but I presume it was to quash the proceedings instituted on 16th February, some months before the term of the contract expired.

I am unable to follow the reasoning of the learned Judges. In the present case I cannot see why the complainant should be deprived of

(1) (1906) 11 C.W.N., 247.



his remedy merely because the respondent succeeded in inducing the Magistrate to adjourn the case until the last day of the term of his contract.

No doubt the Magistrate cannot now order the respondent to perform the contract, but at the time when the complaint was made the complainant had the option (if the facts he alleged are true) of compelling the respondent to refund the money or compelling him to work for the unexpired part of the term of his contract. By the delay in disposal of the case he has not forfeited his right to the former remedy.

I set aside the Magistrate's order, and direct him to proceed to dispose of the case on the merits.

Before Mr. Justice Ormond.

THA MYA AND SAN HLA *v.* KING-EMPEROR.

*Abetment of grievous hurt with dangerous weapon—Abetment of assault—Knowledge of abettor—Offence committed in presence of abettor—Indian Penal Code, ss. 34, 114.*

Where A urged B to attack C, and B stabbed C with a knife, but there was no proof that B had the knife in his hand at the time of A's urging him on, or that A knew in any other way that B would be likely to use a knife.

*Held*,—that A could not be convicted of abetting an offence under section 326 of the Indian Penal Code, but only of abetting assault.

Section 114 of the Indian Penal Code only applies where, the abetment having been made beforehand, the abettor is also present when the offence abetted is subsequently committed.

The evidence discloses the following facts :—Complainant had an altercation with the two appellants, who chased him. Nga San Hla cut complainant in the forearm with a clasp knife and Nga Tha Mya threw sticks at him. Complainant says Tha Mya told San Hla to "go for him" and that San Hla took a *da* from Tha Mya with which he stabbed him. But this is not corroborated. There is evidence to show that San Hla had a clasp knife shortly after the occurrence, and the Hospital Assistant says the wound looked as if it had been caused by a knife. The learned Magistrate has found that the common object of both appellants was to assault the complainant; that San Hla assaulted with a *da* and Tha Mya assaulted by throwing sticks. He does not think, however, that Tha Mya is an abettor, because he would not be an abettor if he had been absent; and he refers to section 114 of the Indian Penal Code. He has held that both appellants are jointly liable under section 34 of the Indian Penal Code. I would point out that abetment is defined in section 107 of the Indian Penal Code; and that section 114 of the Indian Penal Code only applies where, the abetment having been made beforehand, the abettor is also present when the offence abetted is subsequently committed. Section 34 of the Indian Penal Code does not apply so as to convict Tha Mya of causing grievous hurt, unless, both appellants having the common object of assaulting the complainant, Tha Mya knew it would be likely that San Hla would use a knife or a *da*. In this case I think it would be unsafe to rely upon complainant's statement that San Hla took a *da*

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*Criminal  
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1908.*

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from Tha Mya. And if his statement that Tha Mya urged San Hla to go for him be accepted as true, there is nothing to show that at that time San Hla had the knife in his hand. Tha Mya therefore only abetted an assault by San Hla. The facts show, however, that he also committed an assault himself. I reduce the sentence of five years on Nga San Hla to one of three years' rigorous imprisonment. I alter the conviction of Nga Tha Mya from one under section 326 of the Indian Penal Code to one of assault under section 352, Indian Penal Code, and I alter his sentence to one of three months' rigorous imprisonment.

Civil 1st  
Appeal  
No. 34 of  
1907.  
June 8th,  
1908.

Before Mr. Justice Irwin, C.S.I., Officialing Chief Judge  
and Mr. Justice Ormond.

MA PAW AND PO SAUNG v. MA MON, MA MYIT, MA TIN, E KIN,  
MAUNG SEIN AND E HLAING.

Connell and Lentaigne—for appellants (plaintiffs).

Giles and Higinbotham—for respondents (defendants).

*Buddhist Law: Inheritance—Claim of children of divorced couple to property acquired during second marriage—Filial relationship.*

Where one of a Burmese Buddhist divorced couple marries again and has children by the second spouse, the children of the first marriage are not entitled to share in property acquired during the second marriage, unless they have maintained filial relations with the parent concerned.

Facts constituting filial relationship considered.

*Mi Thaik v. Mi Tu*, S.J., L.B., 184; *Ma Shw: Ge v. Nga Lan*, S.I., L.B., 296; *Maung Hmat v. Ma Po Zon*, P.J., L.B., 469; *Ma Pon v. Maung Po Chan*, 2 U.B.R., 1897—01, 116; *Mi San Mra Rhi v. Mi Than Da U*, 1 L.B.R., 161; *Ma Thet v. Ma San On*, 2 L.B.R., 85; followed.

*Maung Ba Kyu v. Ma Zan Byu*, P.J., L.B., 299, referred to.

The plaintiffs-appellants, aged 33 and 29 respectively, are the children of U So, who died early in 1905, and Ma Me Yu. U So and Ma Me Yu were divorced over twenty years before his death. After the divorce he married the first respondent, Ma Mon, and the other respondents are the issue of that marriage. Plaintiffs sue for one-eighth of the property acquired during the second marriage.

The 6th paragraph of the plaint runs thus:—"That the plaintiffs had been in filial connection with their father U So deceased, and the family tie was never broken in his lifetime." This was expressly denied in the written statement, and the defendants said that "the plaintiffs are not entitled to get any inheritance inasmuch as they have failed to plan and work together with U So before his death." The issues which were decided were the 8th and 9th, viz.:—

- "8. Had the plaintiffs been in filial connection with their father deceased, and family tie was never broken in his lifetime?
9. Are plaintiffs entitled to a share in the property acquired during second marriage?"

On both these issues the lower Court found in the negative, and dismissed the suit.

I shall consider the question of law first. The earliest ruling on the point is in *Mi Thaik v. Mi Tu* (1). The decision was carefully

(1) S.J., L.B., 184.

worded by Mr. Jardine, and is set out in the judgment of the lower Court. It seems to exactly fit the present case, except that at the time of the divorce the mother got a share of the property, though no provision was specially made for the child. In present case there seems to have been no property to divide. The ruling was that the daughter, who lived with her mother and step-father, and did not renew filial connection with her own father, was not entitled to share in the property acquired during the second marriage. The learned Judge said :—

In the absence of special contract or conduct equivalent to contract, the girl who goes out with her mother and clings to her and to the mother's new husband has become a member of a new family and lost her rights in the old.

Hence the ruling that she cannot inherit from her father unless she renews filial relations with him.

In *Ma Shwe Ge v. Nga Lan* (2), the children had, at the time of the divorce, obtained a share of the property then existing, but this fact does not seem in any decree to have formed a basis for the decision that "the children of the divorced wife shall not inherit the property of their father acquired after his marriage with a second wife, unless they continue to live and plan and work with him". The learned Judicial Commissioner (Mr. Ward) said :—

There is nothing to show that by living or working with their father, or assisting him in any way, they have contributed anything towards the acquisition of this property, and the mere fact that one of them is on friendly terms with the father, and that years ago the father interested himself in them and taught them can clearly, I think, give them no claim to share in the property.

These two rulings were considered by Mr. Aston in the case of *Maung Ba Kyu v. Ma Zan Byu* (3), when the plaintiff was a minor. The learned Judge pointed out that in neither of those cases was the right of inheritance treated as extinguished by the divorce, but by the conduct of the children subsequent to divorce, a test which could hardly be applied in the case of a minor. He held that a divorce, coupled with the fact that the son, during his minority, lived with his divorced mother, does not divest the son of his ordinary legal right of inheritance, but this finding was expressly based on the rule relating to the son of the deceased wife who had not been divorced.

In *Maung Hmat v. Ma Po Zon* (4), the plaintiff, child or a divorced wife, was of full age before her father's death. The Judicial Commissioner (Mr. Copleston) adopted Mr. Ward's rule in *Ma Shwe Ge v. Nga Lan* (2), and he said :—

A child divorced from her father's family, and continuously resident with her divorced mother after she is of an age when she might assist in the affairs of her father's family, appears to be in the position nearly of a child adopted from the father's family, and while she acquires or retains rights in her mother's or new family's property, she loses rights in the family whence she came.

The first three rulings I have cited, and all the rulings on the point which were then available in Upper Burma, were carefully considered

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(2) S.J., L.B., 296.

|

(3) P.J., L.B., 299.

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(4) P.J., L.B., 469.

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by Mr. Thirkell White in *Ma Pon v. Maung Po Chan* (5). The conclusion was this :

Daughters of a divorced wife who lived with her mother and do not maintain filial relations with their father, but live entirely separate from him, are not entitled to a share in his estate when there has been a division of property at the time of the divorce.

This is a somewhat narrow ruling, but the learned Judicial Commissioner said:—

The intention of the law seems to be that on divorce separate households should be constituted and that the members of each household should not retain the right of sharing in the estate of the other.

The above cases were considered in *Mi San Mra Rhi v. Mi Than Da U* (6), in which property was assigned to the children at the time of divorce, and the father died while the children were minors. Mr. Aston's decision in *Maung Ba Kyu v. Ma Zan Byu* (3) was overruled. Birks, J., said:—

The family tie is severed by divorce, and the rights of the children of a divorced pair seem to depend upon the arrangements made at the time of the divorce as to which branch of the two families they shall belong to. The children while minors are bound by the choice of their parents in this respect.

Compleston, C.J., said :—

The children lived with their mother. They did visit their father, and he helped both to support and educate them, but they never rejoined his family, and I do not think it can be said that filial relations were either maintained or renewed.

And later :—

Nor can I agree that the fact of his father helping to educate or maintain him is sufficient to revive rights which he had lost, as I believe was the case in law and intention, at the time of his mother's divorce by mutual consent, when he received a considerable amount of property, against the waste of which by his mother precautions were taken.

In *Ma Thet v. Ma San On* (7), the husband and wife quarrelled and separated, the wife taking plaintiff with her. Plaintiff subsequently returned to her father and lived with him for ten years, then left him, and married, and her father took no notice of her for the six years preceding his death. It was held that the parents were divorced by merely living apart for a year (this has since been overruled) and that plaintiff had a right to inherit because the filial relationship between father and daughter was resumed and continued for many years after the separation.

In the Kinwun Mingyi's Digest there are two sections bearing on the present case. Section 215 relates to a divorce with division of the property, section 217 to a divorce in which all the property is left with the wife. In both cases the property acquired during a second marriage is assigned to the children of that marriage, and the children of the divorced wife are entirely excluded from sharing it.

There seems then to be a great weight of authority in favour of the proposition that a child of a divorced couple is entitled to inherit from the parent with which he or she lives, and is generally not entitled to inherit from the other parent (when that other parent has

married again and has children by the second spouse) property acquired during the second marriage ; and that visiting the other parent and receiving presents or even maintenance from him does not constitute a continuance or resumption of filial relations such as would entitle the child to inherit such property. This I take to be a correct statement of the law.

Now as to the facts. Po Saung says he lived with his father for some years, but he cannot say how many years. His witnesses do not support him in this. Po Daung contradicts him. If the rest of the evidence for the plaintiffs be believed it amounts to no more than this, that Po Saung was *shinbyued* once by his father and twice by his mother, that he was employed by his father to sell paddy and on other business, that he once signed a promissory note jointly with his father, that both plaintiffs were always on friendly terms with their father, visited him frequently, and travelled with him, that he took them to festivals, and they contributed some planks for his coffin. Even if all this be true it would not, in my opinion, constitute a maintenance or renewal of filial relations sufficient to entitle plaintiffs to inherit the property acquired during the second marriage.

The fact that the divorced wife and the plaintiffs received nothing at the time of divorce makes, I think, no difference, at any rate so long as it is not alleged that there was then any property to divide.

I agree with Mr. Justice Copleston in dissenting from Mr. Aston's view that the rule for children of undivorced wives has any application to the children of a divorced wife.

I have not overlooked the fact that the right of the plaintiffs to share was not at first questioned. Arbitrators were appointed to divide the estate in accordance with Buddhist law. Several attempts to compromise were made, and in consequence of the delays attendant on these attempts the arbitrators refused to act. It may be assumed that both parties and the arbitrators thought plaintiffs were entitled a share. The *Dhammathats* being so obscure and conflicting as they are, it is not surprising that Burmese Buddhists as a rule know very little about Buddhist law. Many of the questions that arise are found by the Courts very difficult to decide. It is unfortunate for the plaintiffs that they did not accept a compromise. The fact that their right to a share was not denied before they instituted the suit is one which cannot influence the decision in the absence of positive evidence that such right is recognized by Burmese Buddhist law.

I would dismiss the appeal with costs,  
Ormond, J.—I agree.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.

KING-EMPEROR v. AW SU.

*Edible birds' nests—Possession—Theft—Indian Penal Code, s. 378.*

Edible birds' nests are not in the possession of anybody until they are collected. A person who collects them without a license, therefore, does not commit theft.

Edible birds' nests are not in the possession of anybody until they are collected. A person who collects them without a license, therefore, does not commit theft.

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I alter the conviction of theft to one of collecting edible birds' nests without a license, under rule 113 of the rules framed under the Lower Burma Land and Revenue Act, and I reduce the sentence to one month's rigorous imprisonment, which has been undergone.

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Appeal  
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June 19th,  
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Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.

MA HLA YA  
MA HLA WA } v. KING-EMPEROR  
MA PU

Sealy—for appellants.

| Christopher—for respondent.

*Criminal Trespass—Unlawful remaining—Remaining on another's property after conviction for trespass—Indian Penal Code, s. 441.*

The accused, after having been convicted of criminal trespass committed by entering on certain land, were again prosecuted for a further trespass by remaining on the land in spite of the previous conviction.

*Held*,—that the accused were not liable to be again convicted.

The appellants had been convicted on 24th April of criminal trespass committed by entering on certain land in possession of Maung Shwe Kyo. In the present case they were convicted of a second trespass by remaining on the land in spite of the previous conviction.

I do not think the acts of the accused can be brought within the definition in section 441 of the Penal Code. There are two clauses in that section, the first relating to an entry with criminal intent, that is to say, an unlawful entry; the second relating to a lawful entry followed up by remaining with unlawful intent. The Magistrate found the entry to be unlawful; therefore the second clause can have no application to the case. The intention of the Legislature evidently is that only one offence can be committed on each entry. Under the first clause the offence is committed by unlawful entry with certain intent. Under the second clause one offence and one only is committed by remaining for any length of time with unlawful intent after a lawful entry,

If there were any ambiguity about the section the same result would be arrived at by a consideration of section 71, first clause. Assuming that the time during which the appellants remained on the land may be divided into parts, and the act of remaining during each of those parts is a separate offence, still the aggregate of those offences would constitute one offence, and section 71 makes it clear that the offender may not be punished with the punishment of more than one of all the offences, unless it be so expressly provided. It is not so expressly provided in the sections relating to criminal trespass.

I set aside the convictions and sentences, and acquit the appellants and direct that the fines be refunded.

*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.*

KING-EMPEROR v. JALAL KHAN.

*Reference by bench of Magistrates to superior Magistrate for higher punishment—Reference of a case tried summarily—Criminal Procedure Code, 1898, ss. 346, 349.*

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Section 349 of the Code of Criminal Procedure does not authorize a bench of Magistrates to refer a case for higher punishment to a District Magistrate or Subdivisional Magistrate.

A bench of Honorary Magistrates tried this case summarily under the provisions of section 261, Code of Criminal Procedure, and sent the proceedings under section 349 to the Subdivisional Magistrate for the infliction of a more severe sentence than they were competent to inflict. The Subdivisional Magistrate fined the accused Rs. 50. There is no appeal against this sentence. The accused has applied for revision.

The procedure prescribed in section 349 is obviously unsuited to cases tried summarily, and that section does not authorize any bench of Magistrates to refer a case for higher punishment.

I set aside the conviction and sentence, and direct the Subdivisional Magistrate to proceed to dispose of the case as if it had been referred to him under section 346, Code of Criminal Procedure.

*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.*

MORALI AND SIX OTHERS v. KING-EMPEROR.

*J. R. Das—for applicants.*

*Criminal  
Revision  
No. 145B of  
1908.*

*June 25th,  
1908.*

*Order for security to keep the peace—Offence involving breach of the peace—House-trespass with intent to commit theft—Power of Magistrate to whom a case is submitted for release on probation—Criminal Procedure Code, ss. 106, 380, 562—Indian Penal Code, ss. 380, 451.*

House-trespass with intent to commit theft is not an offence involving a breach of the peace, and consequently a person convicted to that offence cannot be required to execute a bond for keeping the peace.

*Quære.*—Can a Magistrate to whom a case is submitted under the proviso to section 562 of the Criminal Procedure Code pass, under section 380, any order other than a sentence or an order for release on probation?

The second class Magistrate tried the accused on charges of theft in a house under section 380, Penal Code. He found that the offence was proved, but was a trivial one, and sent the accused to the Subdivisional Magistrate, with a recommendation that the case be dealt with under section 562 of the Code of Criminal Procedure.

The Subdivisional Magistrate framed a fresh charge of house trespass with intent to commit theft, under section 451, Penal Code, examined several witnesses for the defence, and convicted the accused under section 451. He considered that the offence was by no means trivial, and passed sentences of imprisonment. On appeal one of the sentences was reduced from one year to six months, and the prisoner was ordered to give security to keep the peace for one year.

The prisoners apply for revision on several grounds. The only ones that need be noticed are that the Subdivisional Magistrate had no jurisdiction to frame a charge under section 451, that the case was



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a trivial one and a proper one for action under section 562, and that the Sessions Judge was wrong in law in demanding security to keep the peace.

The framing of a second charge seems to have been quite superfluous. The Magistrate regarded house-trespass with intent to commit theft as a more heinous offence than theft in a house. That is not so. The punishment for both is the same. Aggravated forms of house-trespass may well be regarded as more heinous than the offence with intent to commit which the trespass is committed, but that is not so in the present case. It is impossible to commit theft in a house without committing house-trespass for that purpose. The trespass therefore is a mere incident of the principal offence of theft.

It is contended that the Subdivisional Magistrate had no authority to consider the question of the accused's guilt or innocence at all; that his powers are limited to either passing sentence or passing an order under section 562; and that the further inquiry and additional evidence referred to in section 380 of the Code of Criminal Procedure must be restricted to the question whether the case is a fit one for the exercise of powers under section 562.

The proviso to section 562 and section 380 are similar to section 349 of the Code of Criminal Procedure. Both relate to a case tried by a second or third class Magistrate, who thinks that it ought to be disposed of in some manner in which he is not empowered to dispose of it, and the object of both is that the case may be so disposed of without the inconvenience of a new trial. There is no doubt that if the case had been referred under section 349 in order that a sentence exceeding six months should be passed, the Subdivisional Magistrate's proceedings would be quite regular. The question whether they are equally regular under section 380 is one of some difficulty, but to my mind no great difficulty is created by the terms of section 380 itself; they could easily be construed as conferring the same powers as section 349 (2). The only serious obstacle to such a construction is the use of the word "convicted" in the proviso to section 562. The corresponding expression in section 349 is "is of opinion that the accused is guilty." In that section the word "convicted" seems to have been carefully avoided, in order to leave the Subdivisional Magistrate the option of reopening the whole case if he should think fit to do so. In section 562 the Legislature seems to have deliberately taken the contrary course. It is argued that the conviction by the second class Magistrate cannot be set aside except by a Court of appeal or revision, and that the words "may thereupon pass such sentence or make such order as he might have passed or made if the case had been originally heard by him" confer no power except to pass sentence as under section 258 (2), or make the alternative order provided by section 562.

If this construction be correct, it follows that even if the Subdivisional Magistrate considers that on the evidence the accused is clearly not guilty, he is still bound either to pass sentence or to bind over the accused under section 562. It is difficult to suppose that this was the intention of the Legislature.

In the present case I do not think it is necessary to decide this difficult point, for two reasons. Firstly, the second class Magistrate did not in fact formally convict the accused at all. He framed his judgement in terms which would be suitable for a reference under section 349. Secondly, if I were to uphold the objection I should be obliged to restore the conviction of theft, and offence which includes the offence under section 451, and to direct the Subdivisional Magistrate to proceed under section 380 of the Code of Criminal Procedure. This would make no difference to the prisoners, because I entirely agree with the Subdivisional Magistrate and the Sessions Judge that the offence was a serious one and that the sentences of six months' imprisonment are appropriate.

As to the third point, the offence of which the accused were convicted, house trespass with intent to commit theft, is not an offence involving a breach of the peace. Therefore the Sessions Judge's order demanding security to keep the peace is illegal. I set it aside.

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*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge and  
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MA MA AND MA PWA v. MA HMON AND THREE OTHERS.

N. N. Burjorji—for appellants.

Civil 1st  
Appeal No.  
68 of 1908.

June  
21th, 1908.

*Administration suit—Value of suit—Subject-matter of suit—Subject-matter in dispute—Computation of court-fee—Valuation for court-fee and for jurisdiction—Share claimed by plaintiff—Determination of Court to which appeal lies—Court-fees Act, 1870, s. 7, iv (f)—Suits Valuation Act, 1887, s. 8—Lower Burma Courts Act, 1900, ss. 2 (h), 25, 28.*

In an administration suit the court fee on the plaint should be computed *ad valorem* on the estimated value of the share claimed by the plaintiff under section 7, iv (f) of the Court-fee Act: and the value for purposes of jurisdiction is the same under section 8 of the Suits Valuation Act.

The Court to which an appeal lies is determined by the value of the suit, *i.e.*, the share claimed by the plaintiff, under section 28 of the Lower Burma Courts Act.

*Balvant Ganesh v. Wana Chintamon*, (1893) I.L.R. 18 Bom., 209, followed.

*Boidya Nath Adya v. Makhan Lal Adya*, (1890) I.L.R. 17 Cal., 680, dissented from in part.

*Bhogilal v. Popatbhai*, (1882) I.L.R. 7 Bom., 125; *Eraksha Dhanjisetth v. Adarji Dorabji*, (1883) I.L.R., 7 Bom., 535; cited with approval.

*Hikmat Ali v. Vali-un-Nissa*, (1889) I.L.R. 12 All., 506, referred to.

In this suit Ma Ma was plaintiff, Ma Pwa and four others defendants. The suit was dismissed. Ma Ma and Ma Pwa jointly appealed. The copy of decree describes the suit thus: "Claim for one-third share of inheritance in the estate of the late Ma Shwe Bwui. Suit valued at Rs. 2,000." The suit would therefore be *prima facie* cognizable by a Subdivisional Court. But there is no Subdivisional Court in Moulmein Town. The suit was instituted and tried in the District Court.

The appeal is valued at Rs. 6,000, and it is explained that Ma Ma's share was valued at Rs. 2,000, but the shares of Ma Ma and Ma Pwa are valued at Rs. 6,000.

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Under section 28 (1) (c) of the Lower Burma Courts Act, an appeal from a decree or order of a District Court shall, where the value of the suit is Rs. 5,000 or upwards, lie to the Chief Court, and in any other case to the Divisional Court. Thus the determination of the question to what Court the appeal lies does not depend at all on the valuation of the appeal, but on the value of the suit in the District Court. If the value of the suit were really Rs. 2,000 as stated in the decree, the appeal would lie to the Divisional Court.

But the judgment begins with a statement that the suit is for the administration of the estate of Ma Shwe Bwin. We have therefore called for the record in order to examine the plaint. The plain sets out that Ma Shwe Bwin died leaving the property named and specified in the schedule appended to the plaint (the total estimated value of which is Rs. 2,73,310), that plaintiff Ma Ma is entitled to one-third of that property, that the whole of the property has been taken possession of by defendants 2 and 3, and plaintiff prays that an account may be taken of the property (moveable and immoveable) of Ma Shwe Bwin, and it may be administered under the decree of the Court. For the purpose of the Court-fees Act the plaintiff valued the suit at Rs. 2,000, and prayed that she might be allowed to pay the additional fees after taking of the accounts in necessary.

From this it appears that on the face of the plaint the value of the suit was enormously in excess of Rs 5,000. When the attention of the learned advocate for the appellant was drawn to this point he explained that there are very large encumbrances on the estate, and its net value would probably be about Rs. 9,017. If the question of court-fee had been considered by the lower Court it is probable that some such explanation as this would have been forthcoming. We think therefore that the plaintiff should be allowed to value the estate at Rs. 9,017.

But this merely lands the plaintiff-appellant in further difficulties. The questions now arise: How is the court-fee on the plaint to be determined? If *ad valorem*, is it on the value of the whole estate or on the share claimed by plaintiff in the suit? If the court-fee is *ad valorem*, then section 8 of the Suits Valuation Act comes into operation. The suit is certainly not one of those excepted from the operation of that section. Therefore the valuation for jurisdiction is the same as for the computation of court-fee. The share claimed by plaintiff is now valued at Rs. 3,006. If that be the value of the subject-matter of the suit, the appeal lies to the Divisional Court.

In *Boidya Nath Adya Makhan Lal Adya* (1), the learned Judges said that a suit for partition was not within the terms of section 8, Suits Valuation Act. It is difficult to understand how that conclusion was arrived at. The section expressly includes all suits in which court-fees are payable *ad valorem* under the Court-fees Act, except four definite classes. Neither a partition suit nor an administration suit is included in those four classes.

(1) (1890) I.L.R. 17 Cal., 680.

It was not argued that the suit is one in which it is not possible to estimate the money-value of the subject-matter, nor is it permissible to take that view. The case just cited is clear on that point so far as partition suits are concerned. The High Court of Bombay took the same view in *Balvant Ganesh v. Nana Chintamon* (2).

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We have ascertained that the practice in the Recorder's Court and on the Original Side of this Court has been for many years to charge an *ad valorem* fee on the value at which the plaintiff estimates his share, subject to the levy of a further fee under section 11 if necessary. The Assistant Registrar reports that an administration suit is regarded as a suit for an account, under section 7, iv (f), Court-fees Act. It does not appear that the correctness of this practice has ever been questioned. We have not found any ruling on this point directly relating to administration suits, but in *Bhogital v. Popalbhai* (3), and in *Erakshah Dhanjiseth v. Adarji Dorabji* (4), it was held that the stamp payable on a plaint in a suit under section 265 of the Contract Act for winding up a partnership is that required in a suit for an account under section 7, clause iv (f) of the Court-fees Act, namely, an *ad valorem* fee on the amount which the plaintiff estimates to be due to himself. A suit of this kind is practically of the same nature as an administration suit. Both are of the kind described in section 213 Civil Procedure Code.

Against this we have found nothing but an *obiter dictum* of the Madras High Court, in these terms "When the suits relates to coparcenary property, unless it is one for general partition among all the shareholders, the specific and definite share claimed must be held to be the subject-matter of the suit as stated in the Suits Valuation Act and the Madras Civil Courts Act, and the value of the same would determine the Court's jurisdiction, and not that set on the whole property, which will, of course, be the value of a suit in which a general partition of all the shares may be prayed for."

We are of opinion that the practice of the Original Side of this Court and the rulings of the Bombay High Court are correct, and that the stamp payable on a plaint in an administration suit is that indicated in section 7, iv (f) of the Court-fees Act.

The question of jurisdiction is a very important one in the *mufassal*, and there is one more point in respect of it which may be considered. We have found that the court-fee is chargeable under Schedule I, article 1, *ad valorem* on the value of the subject-matter in dispute. By section 7, iv (f), the value of the subject-matter in dispute is defined as the amount at which the relief sought is valued in the plaint, that is to say, the estimated value of the share claimed by the plaintiff. By section 8 of the Suits Valuation Act, the value so determined and the value for the purposes of jurisdiction shall be the same. But it may be said that there is a distinction between the subject-matter in dispute (mentioned in Schedule I to the Court-fees Act) and the subject-matter of the suit.—*Hikmat Ali v. Vali-un-Nissa* (5). Although the

(2) (1893) I.L.R. 18 Bom., 209.

(3) (1882) I.L.R. 7 Bom., 125.

(4) (1883) I.L.R. 7 Bom., 535.

(5) (1889) I.L.R. 12 All., 506.

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subject-matter in dispute is the share claimed by the plaintiff, is the subject-matter of the suit the whole estate? Do sections 25 and 28 of the Lower Burma Courts Act, read with the definition in section 2 (h), override the provisions of section 8, Suits Valuation Act? It is very desirable that these questions should be answered in the affirmative, but we think they cannot so be answered. The expression "subject-matter of the suit" might be construed either way without doing any violence to the English language, but when the effect of one construction would be to render inoperative the very plain terms of another enactment that construction is not admissible.

Our decision then is that in an administration suit the court fee on the plaint should be computed *ad valorem* on the estimated value of the share claimed by the plaintiff, under section 7, iv (f) of the Court-fees Act; the value for purposes of jurisdiction is the same, under section 8 of the Suits Valuation Act, 1887; and the Court to which the appeal lies is determined by the value of the suit (*i.e.*, the share claimed by the plaintiff), under section 28 of the Lower Burma Courts Act, 1900.

As we find that the value of the subject-matter of the suit is estimated at Rs. 3,006, we direct that the appeal be returned to be presented to the Divisional Court. It is left to that Court to deal with the matter of the court-fee on the plaint under section 12, ii, Court-fees Act, remembering that there is nothing in section 7, iv, which can be construed as permitting the plaintiff to put an absurdly high or low value on the relief he claims, either for the purpose of altering the jurisdiction or of evading the payment of court-fees.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

#### KING-EMPEROR v. PO THWE.

Criminal  
Revision  
No. 117B of  
1907.

May 18th,  
1907.

*Trail of previously convicted offender by second class Magistrate—Power of reference for higher punishment—Criminal Procedure Code, ss. 348, 349.*

A was tried by a second Magistrate for an offence for which he was liable by reason of a previous conviction, to enhanced punishment under section 75 of the Indian Penal Code. The Magistrate being of opinion that he was guilty, but that he could not pass an adequate sentence himself, referred the case under section 349 of the Code of Criminal Procedure to the Subdivisional Magistrate, who sentenced him to two years' rigorous imprisonment and a whipping.

*Held*,—that as the case was one to which section 348 of the Code of Criminal Procedure applied, the Magistrate was debarred from referring the case for higher punishment under section 349.

*King-Emperor v. Hla Gyi*, 2 L.B.R., 285, referred to.

*Fox, C.J.*—The accused, who had been previously convicted and was liable, if again convicted, to enhanced punishment under section 75 of the Indian Penal Code, was sent with another accused before a Magistrate with 2nd class powers, charged with theft in a building.

The Magistrate considered that if the accused with the previous conviction were found guilty, he could not pass an adequate sentence on him. He sent the case to the District Magistrate. The latter sent it back for disposal, informing the Magistrate that if on a conviction he considered the punishment he was empowered to award would

be inadequate for the offence, it was open to him to submit the case under section 349 of the Code of Criminal Procedure to a Magistrate with higher powers. The 2nd class Magistrate went on with the case. He convicted and sentenced the accused who had no previous conviction, and he thought the accused who had been previously convicted was guilty, and submitted the case to the Subdivisional Magistrate under section 349. The latter Magistrate sentenced this accused to two years' rigorous imprisonment and to receive a whipping of twenty stripes.

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Upon appeal to the Sessions Court the learned Judge set aside the conviction and sentence, and ordered a retrial of the accused who had the previous conviction. He held that the 2nd class Magistrate had no jurisdiction to deal with the case and refer it under section 349 as he had done. The accused has been retried by the Special Power Magistrate, who found him guilty and sentenced him to three years' rigorous imprisonment.

Being in doubt as to whether his order for retrial of the accused was right, the learned Sessions Judge has referred the case to this Court.

He says that his order conflicts with paragraph 276 of the Lower Burma Courts Manual, but the circumstances of the case brought it within section 348 of the Code.

In *King-Emperor v. Hla Gyi* (1) the subject of a Magistrate with minor powers dealing with a case in which if he convicts he cannot award an adequate punishment, was dealt with at length, and it was held that it is not illegal or irregular for a Magistrate of the 2nd or 3rd class to frame a charge against an accused person in a case which he has jurisdiction to try, even though at the time of framing the charge he intends, if he is of opinion that the accused is guilty, to submit the proceedings to the District or Subdivisional Magistrate to pass sentence. This ruling is applicable in cases other than cases falling within section 348 of the Code, for in cases to which that section applies a Magistrate is precluded from himself coming to a finding or pronouncing an opinion on the innocence of the accused, unless he thinks that he himself can pass an adequate sentence.

If he thinks that on a conviction he cannot himself pass an adequate sentence, he has no jurisdiction to do anything but transfer the case to a District Magistrate specially empowered under section 30, or, if he is empowered to commit to Sessions, follow the procedure of Chapter XVIII for inquiry into cases triable by the Court of Session. Although the section says that the accused shall be committed to the Court of Session, it cannot have been meant that he must be committed even if there is no evidence against him. The object of the Legislature evidently was that in cases where an accused is liable on conviction to enhanced punishment under section 75 of the Indian Penal Code, Magistrates of ordinary powers shall not have the power to try and acquit unless they think that they can pass an adequate sentence within the limit of their powers if they should ultimately find the accused

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(1) 2 L.B.R., 285.

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guilty. If they think they cannot do this, only one of the two courses above set out is open to them to adopt. It also follows that section 349 of the Code would not apply to such a case.

The District Magistrate's order referring back the case against the present accused to a 2nd class Magistrate for disposal, who had expressed his opinion that, if he convicted the accused, he could not pass an adequate sentence of him, was, in my opinion, erroneous.

The District Magistrate was possibly misled by paragraph 276 of the Lower Burma Courts Manual as it at present stands. That paragraph appears to me to conflict with section 348 of the Code of Criminal Procedure.

I think the Sessions Judge's grounds for setting aside the first conviction and sentence and for ordering a retrial were right. The case does not call for interference.

*Hartnoll, J.*—I concur.

*Before Mr. Justice Hartnoll.*

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THA ZAN AND MA SHWE MI v. THA DUN AND MA YON.

*Villa*—for appellants (defendants). | *Nicol*—for respondents (plaintiffs).

*Agent—Conditions for suing by an agent—Absence from jurisdiction of Court—Objections to suing by an agent—Technical objections raised in second appeal—Civil Procedure Code, ss. 37, 51.*

Where a suit was brought and the plaint signed by a duly authorised agent holding a general power-of-attorney, but the proceedings did not show that at the time when the suit was brought, the principals were living outside the jurisdiction of the Court or were, by reason of absence or for any other good cause, unable to sign the plaint themselves.

*Held*,—that as the merit of the case were not affected, objections on these grounds could not be considered when raised for the first time in second appeal; but that they should have been raised in the original proceedings, when the fact of the plaintiffs' absence or otherwise could have been inquired into.

*Abdul Karim v Pana Mustan*, 8 Bur. L.R., 103; 1 L.B.R., 191; *Bisanda v. Lakmichand Kisanchand*, 6 Bom., H.C.R., 159; *Moolala & Co. v. Poonasawmy*, 2 L.B.R., 41; *Basdeo v. Smidt*, (1899) 1 L.R. 22 All., 55; referred to.

*Munoo Dossee v. Ishan Chunder Banerjee*, 15 W.R., 245; *Parvatibai v Vinaye\* Pandurang*, (1887) 1 L.R. Bom., 69; followed.

In this case the following order on certain preliminary points was delivered by—

*Hartnoll, J.*—Maung Tha Dun and Ma Yon by their agent, Maung Po Te, sued Maung Tha Zan and Ma Shwe Mi for the redemption of certain paddy land on payment of Rs. 800. The claim was resisted. The Subdivisional Court dismissed the suit. On appeal the Divisional Court set aside the order of dismissal and gave a decree for redemption. Against this latter decree this second appeal has been filed.

The first ground is that the lower Appellate Court should have dismissed the respondents' suit inasmuch as there was no proper presentation of the plaint in the Court of first instance, the agent having sued in his own name instead of that of the principal. At the hearing of this ground it was modified, as it was allowed that the agent had not sued in his own name instead of that of the principal. It is clear that Maung Tha Dun and Ma Yon sued by an agent, who was



Maung Po Te. It was further objected that the plaintiff was bad in that—

- (1) it was not apparent from the proceedings that when the suit was brought Maung Tha Dun and Ma Yon were living outside the jurisdiction of the Court ;
- (2) Maung Po Te was not an agent who was duly authorized to sign the plaintiff ;
- (3) Maung Po Te was not proved to the satisfaction of the Court to be acquainted with the facts of the case, and so the plaintiff was not correctly verified according to law.

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These objections have been taken now for the first time in second appeal. The only case quoted in support of them is that of *Abdul Karim v. Pana Mustan* (1). In my opinion the ruling in that case does not apply in that it is allowed that in the present case the suit was brought by the principals in their own name through an agent. It is clear also that in the present case Maung Po Te did hold a power-of-attorney that is general in its terms, and that expressly authorizes him to bring and defend suits. Section 37 of the Code of Civil Procedure states that one form of recognized agent is a person who holds a general power-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing him to make and do such appearances, applications and acts on behalf of such parties; and the point in the present case is whether, as it is not clear from the proceedings that, when Maung Po Te presented the plaintiff, his principals were living outside the jurisdiction of the Court, this is not a fatal objection. In the case of *Munoo Doss v. Ishan Chunder Banerjee* (2), where a lower Appellate Court threw out a case on the ground that the plaintiff had not been filed by a recognized agent within the meaning of section 17 of Act VIII of 1859, though the point had been disposed of by the Court of first instance, it was held that the case should not have been thrown out on such a technical objection not affecting the merits of the case. Again in the case of *Bisanda v. Lakhmichand Kisanchand* (3), it was held that the manager of a firm is not, for the purpose of presenting a plaintiff, the recognized agent, under section 17 of the Civil Procedure Code, of a partner who is present within the jurisdiction, and that the manager and such partner should join in presenting the plaintiff or appointing a pleader; but that the partner not so joining is not a ground on which an Appellate Court should reverse the decree of a lower Court, unless the irregularity affects the merits of the cause or the jurisdiction of the Court. Again in the case of *Parvatibai v. Vinayek Pandurang* (4), where late in proceedings an objection was taken to an agent acting where at certain stages of the proceedings his principal had resided within the jurisdiction of the Court, and at those stages objection had not been taken, it was held that the objection must be deemed to have been virtually waived. In the present case, when the agent presented the

(1) 8 Bur. L.R., 103; 1 L.B.R., 191.  
(2) 15 W.R., 245.

(3) 6 Bom. H.C.R., 159.  
(4) (1887) I.L.R. 12 Bom., 69.

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plaint, his principals may have and may not have been residing within the jurisdiction of the Court. As no objection was taken then, it is not clear that his principals were not outside the jurisdiction. If they were outside the jurisdiction, it would appear that the agent was in order in presenting the plaint. Since the agent may have been in order in presenting the plaint I do not consider that an objection on the ground that his principals were within the jurisdiction of the Court should be considered in appeal, and more especially in second appeal. The objection should have been made promptly in the original proceedings and then it could have been properly enquired into. Further, even supposing that the principals were within the jurisdiction of the Court when the plaint was presented, it does not appear that the case has been affected on its merits. I accordingly disallow the first point. The second point is that Maung Po Te was not an agent who was duly authorized to sign the plaint. The law is contained in section 51 of the Civil Procedure Code, and it was considered in the case of *Mootala & Co v. Poonasawmy* (5). The section states that the plaint shall be signed by the plaintiff and his pleader (if any) provided that, if the plaintiff is, by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorized by him in this behalf. Since Maung Po Te had a power general in its terms and which expressly authorized him to bring and defend suits, he must be held to have been duly authorized to sign the plaint; but the question remains as to whether, since there is nothing on the record to show that the plaintiffs were, by reason of absence or for other good cause, unable to sign the plaint, it must now be ruled to be bad and rejected. In the case of *Basdeo v. Smidt* (6), it was held that the mere fact that the plaint in a suit has not been signed by the plaintiff named therein or by any person duly authorized by him in that behalf, as required by section 51 of the Code of Civil Procedure, will not necessarily make the plaint absolutely void, and that a defect in the signature of the plaint or the absence of signature, where it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be waived by the defendant and, having regard to section 578 of the Code of Civil Procedure, is not a ground for interference in appeal. In the present case no objection is made till second appeal. The plaintiffs may have been, by reason of absence or for other good cause, unable to sign the plaint; as no objection was made at the commencement of the proceedings I am of opinion that, if there was any error in Maung Po Te signing, and this is not clear, the defendants must be taken to have waived their right to object. The power-of-attorney being such as it is, it must be held that the suit was filed with the knowledge and by the authority of the plaintiffs, and that is the important point, as was pointed out in the case of *Mootala & Co. v. Poonasawmy* (5). I disallow the point.

The third objection taken is that Maung Po Te was not proved to the satisfaction of the Court to be acquainted with the facts of the case, and so that the plaint was not correctly verified according to law.

(5) 2 L.B.R., 41.

(6) (1899) I.L.R. 22 All., 55.

The objection should have been made promptly and seems to be technical. The sequel has proved that he was acquainted with the facts of the case. I disallow it.

My findings on the first ground of appeal being adverse to the appellants the hearing of the appeal will now proceed.

*Before Sir Charles Fox, Chief Judge, and Mr. Justice Irwin, C.S.I.*

MA PE AND KYU KIN v. MA THEIN YIN.

*Lambert*—for applicant.

*Agabeg*—for respondent.

*Letters of Administration, Object of—Proper time for grant of letters of administration—Person entitled to whole or part of estate—Younger daughter of deceased Burman Buddhist not entitled to letters of administration during life-time of mother—Probate and Administration Act, 1881, s. 23, Chaps. VI, VII.*

In the case of one a Burman Buddhist married couple dying, it can rarely, if ever, be necessary that letters of administration to the deceased's estate should be granted after the expiry of the period of limitation for the recovery of debts owing to or by the deceased.

Object of the grant of letters of administration explained.

The younger daughter of a deceased Burman Buddhist is not, during life-time of her mother, a proper person to be granted letters of administration to the estate of her deceased father.

*Ma On and others v. Ko Shwe O and others*, S.J., L.B., 378, followed.

*Fox, C. J.*—Eighteen years after the death of her father Sit Tit the respondent, his younger daughter, applied for letters of administration to his estate. During the argument of this appeal it was stated that Sit Tit was a Chinaman, but this nowhere appears on the proceedings. There is a note by the Judge that the parties agreed that the Buddhist law should apply in the distribution of the estate. If Sit Tit was not in fact a person to whom the Burmese Buddhist law of inheritance was applicable, the agreement of the parties could not make such law applicable. In case some other law was applicable the applicant did not show what that law was, and that under it she was entitled to any part of her father's estate. If, however, Sit Tit was a person to whom the Burmese Buddhist law of inheritance was applicable, the applicant being a younger daughter had no present right to a share of his estate, her mother being still alive. The position of a surviving parent and of children of a deceased parent in relation to his or her estate was laid down in *Ma On and others v. Ko Shwe O and others* (1). Under that ruling, assuming that the Burmese Buddhist law was applicable, the property of Sit Tit devolved upon his death on the applicant's mother, and she was entitled absolutely to half of what Sit Tit and she had owned jointly, and to a life interest in the remaining half, subject to the eldest child's right to a quarter share.

The applicant has no right to claim or recover anything whilst her mother lives. At present there is only a mere possibility of her living longer than her mother and of becoming on her mother's death entitled to share in property which at one time belonged to her father and mother jointly. This does not, in any opinion, bring her within the

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(1) S.J., L.B., 378.

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terms of section 23 of the Probate and Administration Act as a person who, according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased, would be entitled to the whole or any part of the deceased's estate.

Whether or not the Burmese Buddhist law of inheritance applied to Sit Tit, the appellant did not show that she was a person entitled to letters of administration to his estate, and consequently letters should not have been issued to her.

The fact that the application was made about eighteen years after Sit Tit's death shows that the objects of granting letters of administration to an estate are not correctly understood. The object of a proceeding under the Act is to enable a representative of the deceased to be appointed to exercise the powers and to perform the duties imposed on such representative by the Act, and no more. Such powers are set out in Chapter VI of the Act, and such duties are set out in Chapter VII. An administrator is bound to collect with reasonable diligence the property of the deceased and the debts which were due to him: he has to pay first of all funeral expenses to a reasonable amount, death-bed charges and board and lodging for a month if anything is due for the latter; he then has to pay the expenses of obtaining letters, and then wages to labourers, artisans and domestic servants which accrued within three months next preceding the deceased's death: after payment of the foregoing he has to pay the other debts of the deceased. After all debts are paid he is bound to distribute the remaining property amongst the persons entitled to it under the law of inheritance applicable to the deceased.

In the case of persons entitled to make wills an estate may remain not wholly administered for years, because the ultimate devolution of the property may be prolonged by the terms of a will, but in the case of one of a Burmese Buddhist married couple dying, it can rarely, if ever, be necessary that letters of administration to the deceased's estate should be granted after the period of limitation for the recovery of debts owing to or by the deceased has expired.

All property other than debts and securities may be recovered without letters of administration by the person entitled thereto. The survivor of a Burmese Buddhist married couple would be entitled to recover for himself or herself all such outstanding property. If debts which were due to the deceased are not recovered within the period of limitation for a suit for recovery of them, they become irrecoverable, and are lost to the estate; consequently the issue of letters of administration with a view to collecting such debts would be useless, and should not be granted.

Section 85 of the Act empowers the court to refuse to grant an application for letters of administration for reasons to be recorded by it in writing. The present is a case in which an order under this section should have been made. The funeral expenses, death-bed charges, wages due by the deceased must have been paid years before. All debts due to the deceased must have been either collected or have become long since time-barred. The property of the deceased and of

the respondent's mother had come into and was in the mother's possession, and she was entitled to keep it. The application was made by a daughter who might never become entitled to a share in the property. The manifest object of the application was to get the property out of the possession of the person entitled to it on the ground that it was being wasted. If a child of Burmese Buddhist parents has a right to prevent his or her surviving parent from wasting the one-half of the property in which the parent has only a life interest, the proper method of enforcing such right is by a regular suit. Procedure under the Probate and Administration Act cannot be used for such purpose, and the Courts should not grant letters under the Act when such is the obvious object and design of the application.

I would allow this appeal, reverse the order of the District Court and dismiss the respondent's application. I would also order her to pay the appellant's costs in both Courts.

*Irwin, J.*—I concur.

*Before Mr. Justice Robinson.*

(Original Civil Jurisdiction.)

PO KYA v. { 1. LUTCHMINAPPIAN CHETTY  
AND 3 OTHERS.  
2. MA SEIN.

*Connell*—for petitioner,

*J. R. Das and A. B. Banurji*—for 1st respondents.

*Questions for determination in investigation of claim to attached property—Possession—Constructive possession—Civil Procedure Code, ss. 278, 280, 281.*

The points for determination in an investigation, under section 278 of the Code of Civil Procedure, into a claim to attached property, are questions of possession only. If the claimant is found to be in possession, the only other question that can be considered is whether that possession is really on account of or in trust for the judgment debtor or not.

The possession in question may be constructive possession.

*Bazayet Hossein v. Dooli Chund*, (1878) I.L.R. 4 Cal., 402, referred to.

*Chidambara Patter v. Ramasamy Patter and others*, (1903) I.L.R. 27 Mad., 67; *Monmohiney Dassee v. Radha Kristo Dass*, (1902) I.L.R. 29 Cal., 543; *Sar Tun Pru v. Mi Ani Me*, 1 L.B.R., 180; *P.K.A.C.T. Kadappa Chetty v. Shwe Bo*, 2 L.B.R., 152, at page 158; followed.

Ma Sein is the legal representative of her deceased father's estate which consisted of one house only. The other respondents filed a suit against her as such representative and obtained a decree for Rs. 884-1-0. On the 6th May 1908 they attached the house in execution. The petitioner now applies to have the attachment removed on the ground that he had bought the house from her on the 2nd May 1907 by registered deed and was at the time of the attachment in possession, although Ma Sein was living in it as his tenant. The evidence produced proved the execution of the deed of sale and that since the date thereof Ma Sein had been in possession merely as tenant of petitioner, paying Rs. 15 a month rent, for which receipts were produced. Petitioner also produced receipts for the ground rent and proves that the payments on this account were made by him. From Ma Sein's evidence it

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appeared that at the time of the deed of sale she was 17½ years of age.

It is urged on behalf of the attaching creditor that the house having belonged to the estate of the deceased he was entitled to follow that property, and that the sale although before attachment was subject to his right as creditor of the estate. Reliance was placed on *Bazayei Hossein v. Dooli Chund* (1). It was further urged that the contract by the minor was absolutely void, and that as Ma Sein was in actual possession the attachment could not be set aside.

In reply it is urged that whatever the legal position on the above facts may be, the sole point the Court can consider under sections 278—280, Civil Procedure Code, is whether, when attached, the property was in the possession of the objector or of the judgment-debtor, and if in that of the judgment-debtor whether it was so or not on her own account or as her own property but on account of or in trust for some other person, and that if it is found that the property was in the possession of the objector or held on his behalf the Court must remove the attachment. The words "possess" and "possession" in sections 279 and 280 are not used in a restricted sense as relating to mere tangible or physical possession. They include constructive possession or possession in law—*Chidambara Patter v. Ramasamy Patter and others* (2). Section 280 also speaks of the possession of a tenant. In this case it is proved that Ma Sein was in possession only as a tenant of the objector and the possession in law was that of the objector.

In *Monmohney Dasse v. Radha Kristo Dass* (3), Ameer Ali, J., says:—

The question which the Court has to determine under the claim sections of the Code has been pointed out in a number of cases and it does not seem to me necessary to go over the same ground again. I adopt the principle enunciated in *Hamid Bakht Mozumdar v. Buktear Chand Mahho*; *Sheoraj Mandan Singh v. Gopal Suran Singh*. In the latter case it was held that in an investigation under section 280, what the Court has to determine is merely the question of possession and cannot go into the question of title with respect to the property taken in attachment.

Again in *San Tun Pru v. Mi Ani Me* (4), Copleston, C. J., held:—

The questions which have to be considered during the investigation under section 278, Civil Procedure Code, are comparatively simple, and questions of legal rights and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for, the judgment-debtor or some other person.

Again in *P. K. A. C. T. Kadappa Chetty v. Shwe Bo* (5), Fox, J., held:—

In an investigation under section 27 as to moveable property the Court finds that the claimant was in possession at the time of the attachment and it is not proved by the attaching creditor that the claimant was in possession in trust for the judgment-debtor the Court should remove the attachment. The words "in trust for" should be construed in the sense that the claimant held the property as servant of

(1) (1878) I.L.R. 4 Cal., 402.

(2) (1903) I.L.R. 27 Mad., 67.

(3) (1902) I.L.R. 29 Cal., 543.

(4) 1 L.B.R., 180.

(5) 2 L.B.R., 152 at page 158.

or agent for or otherwise on behalf of the judgment-debtor and that he had no right whatever to the possession of it on his own account if the judgment-debtor claimed it.

In the present case we have a sale of the property long before the attachment and one which has been acted on. Whatever rights the attaching creditor may have cannot be considered and decided in a summary proceeding like the present one. The language of sections 279 and 280 is most clear and stress is laid on possession as the ground of decision. If that possession is with the objector the only further question that can be considered is whether that possession is really on account of, or in trust for, the judgment-debtor. There is no ground whatever for deciding in this case that the objector is holding on account of, or in trust for, the judgment-debtor. She admits the sale, and as between her and the objector neither can sue or be sued upon it.

On the only questions, therefore, that can be considered in an investigation under section 280 I hold that the objector was in possession in law of the property at the time of the attachment and that the judgment-debtor was not. I therefore order the removal of the attachment.

The first respondents must pay the costs of the petitioner. Pleader's fees two gold mohurs.

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*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge, and Mr. Justice Ormond.*

### MAUNG SEIN v. MAUNG KYWE.

*Agabeg—for appellant (plaintiff). | Lentaigue—for respondent (defendant).*

*Claims to inheritance—Evidence regarding death-bed attentions or expenditure on funeral—Neglect of duties of affection and kindred—Probate and Administration Act, 1881, s. 33—Court-fees Act, s. 191.*

In dealing with claims connected with questions of inheritance, little or no importance should be attached to evidence regarding death-bed attentions or expenditure on the funeral obsequies, unless it can be shown that the ordinary duties of affection and kindred have been intentionally and deliberately neglected.

*Chit Kywe v. Maung Pyo*, 2 U.B.R., 1992—96, 184, followed.

*Maung Po v. Kya Zaing*, 1 L.B.R., 178, referred to.

Ma Mwe Swe, widow of Maung Po O, died on 26th February 1907, leaving no natural children. Ba Thin, a minor, was adopted son of Po O and Ma Mwe Swe. Ba Thin's natural father, Maung Sein, applied for letters of administration to the estate of Ma Mwe Swe. He said that Ba Thin was the only person entitled to inherit, and he claimed the right to administer the estate during the minority of Ba Thin.

Maung Kywe, aged 32, objected to the grant, and claimed for himself the right to administer. He admitted that Ba Thin was adopted son of the deceased, but alleged that there were two other adopted children, himself and Ma On Sein aged 11. Letters have been

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granted to him, and Maung Sein's petition dismissed. Maung Sein appeals.

The first ground of appeal, *viz.*, that Maung Kywe's adoption was not proved, was abandoned at the hearing. Both parties are adopted sons of the deceased.

Maung Sein not being himself entitled to inherit, the only way in which letters of administration could be granted to him under any circumstances is under section 33 of the Probate and Administration Act. As Ba Thin is not the sole heir, that section does not apply. Maung Sein's application was rightly dismissed.

Appellant's advocate urged that Maung Kywe had forfeited all his rights by neglecting to provide for the funeral. No authority was cited for this proposition. It is disposed of by the remarks of Mr. Burgess, J.C., in *Maung Chil Kywe v. Maung Pyo* (1), on pages 186-7 :—

It may be as well to say once for all that very little attention, if any at all, need be paid to the efforts of contending parties to exhibit the respective superiority of their claims to inherit through their attention to the deceased owner of property in his last moments and their liberality in the performance of the last obsequies. When there are rival claimants there is commonly a rush among them to gain what are supposed to be the marks of dutiful and deserving heirs as testimony to title when the dispute comes up for judicial determination, and an unseemly and sometimes a violent struggle takes place over the death-bed or over the coffin of the relation whose effects they are so eager to get hold of.

It is not the business of the Courts to read homilies to the people on their conduct, but it is their duty to see that they do not encourage senseless extravagance over funeral ceremonies by taking account of competitive lavishness of expenditure as an element in the estimation of the weight of conflicting claims to inheritance. Unless it can be shown that the ordinary duties of affection or kindred have been intentionally and deliberately neglected, so as to raise a presumption of the rupture or interruption of the connecting bond, evidence referring to the particulars of the discharge of obligations of this nature may generally be passed over as of little or no importance.

It only remains to consider the objection that there is no proper petition by Maung Kywe, setting out the facts required by section 64 of the Probate and Administration Act, and no valuation of the property as required by section 191 of the Court Fees Act. These formalities were held to be essential in *Maung Po v. Maung Kya Zaing* (2). There is on the record a valuation of Maung Sein, showing total of annexure A, Rs. 3,356; total of annexure B, Rs. 1,368; net total Rs. 1,988. On the copy of the letters the court-fee is marked as Rs. 68, that is 2 per cent. on the gross total. The fee is leviable only on the net total. Under these circumstances I do not think it is necessary to interfere with the orders granting the letters, but the Court should see that section 98 of the Act is complied with, for the protection of the revenue.

I would dismiss the appeal with costs. Advocate's fee three gold mohurs.

Ormond, J.—I agree.

(1) 2 U.B.R., 1892—96, 184.

(2) 1 L.B.R., 178.

*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge, and  
Mr. Justice Ormond.*

NE WIN v. MA AUNG GALE.

*Lentaigue*—for appellant (defendant). | *Agabeg*—for respondent (plaintiff).

*Administration of estate of Burman Buddhist—Widow or widower the proper person to administer estate—Grant of letters of administration—Probate and Administration Act, 1881.*

Among Burman Buddhists it may be laid down as a general rule that the widow or widower of a deceased person is the proper person to administer his or her estate; and where such a person survives, letters of administration should not be granted to any other person except for very strong reasons.

Ma Pu Le, who died on 13th June 1907, was first married to Maung Thin, who died about 17 years ago. About a year after his death Ma Pu Le married appellant, Maung Ne Win. Ma Aung Gale applied for letters of administration to Ma Pu Le's estate, alleging that she was the adopted daughter of Maung Thin and Ma Pu Le. Ne Win objected, and denied the adoption. Letters of administration were granted to Ma Aung Gale. Ne Win appeals.

Having regard to the main features of the Burmese Buddhist law respecting the ownership of property by married couples, and the devolution of such property on the death of one of them, it is quite obvious that as a general rule the widow or widower is the proper person to administer the estate. The widow or widower usually has possession of the whole of the estate at the time of the death of the other spouse, and is in most cases entitled to the whole or a large part of it. It would be rash to lay down an absolute rule that in no circumstances should letters of administration be granted to any other person, but I am strongly of opinion that it would require very special reasons to justify such a grant. The reasons given in the judgment now under consideration are that the property is almost entirely Ma Pu Le's ancestral property and the largest share will go to the respondent, and that she seems to be a capable woman, while Ne Win's appearance makes it doubtful whether the same could be said of him. In my opinion, even assuming the findings of fact to be correct and conclusive, these reasons are altogether insufficient basis for an order which enables the step-daughter to take the whole estate out of the hands of her step-father as a preliminary to dividing it between them. I do not base this opinion at all on the fact that the adoption is disputed. I should hold the same if it were admitted that Ma Aung Gale has a right to a share, or even to the largest share.

I think also that it makes no difference whether the widower applies for letters of administration or not. He is in possession of the estate as the natural and proper representative of the deceased. Any person who claims a share of the estate can sue him for it, and the fact that letters of administration have not been issued is no obstacle to such a suit.

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If I am right there is no need to consider the other points which were raised in this appeal.

I would set aside the order of the lower Court, and cancel the letters which have been granted, and direct the respondent to pay the appellant's costs in both Courts. Advocate's fee for this appeal Rs. 51.

Ormond, J.—I agree.

Criminal  
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### Full Bench—(Criminal Reference.)

Before Mr. Justice Irwin., C.S.I. Officiating Chief Judge,  
Mr. Justice Hartnoll, and Mr. Justice Ormond.

S. P. CHATTERJI v. KING-EMPEROR.

*Joinder of charges—Misjoinder—Acts forming part of the same transaction—False information to screen offender—False evidence—Indian Penal Code, s. 71—Criminal Procedure Code, ss. 234, 235 (1).*

The accused, a hospital assistant, was charged at one trial (a) under section 201 of the Indian Penal Code, with making false reports in respect of the bodies of two murdered men, (b) under section 103, with giving false evidence regarding the two bodies in one deposition before the Magistrate, and (c) under the same section, with giving false evidence regarding the two bodies in one deposition before the Court of Session.

*Held.*—that in the absence of anything to show that the accused's intention was to screen the same person or persons in respect of each of the two murdered men, the acts on which the six charges were based could not be considered to form parts of the same transaction. The joinder of the six charges at one trial was therefore illegal, and the trial invalidated.

*Emperor v. Sherufalli Allibhoy*, (1902) I.L.R. 27 Bom., 135; *Nga Ta Pu v. King-Emperor*, 2 L.B.R., 19; *King-Emperor v. Nga To*, 2 L.B.R., 23; *Subrahmanya Ayyar v. King-Emperor*, (1901) I.L.R. 25 Mad., 61; followed.

6 Mad. H.C.R., XXVII (Case No 13 of 1871), dissented from.

*Nga Lun Maung v. King-Emperor*, 2 L.B.R., 10; *Queen-Empress v. Fakirappa* (1890) I.L.R. 15 Bom., 491; referred to.

The following reference was made to a Full Bench by Mr. Justice Irwin :—

In this appeal a preliminary objection has been taken that the trial was illegal by reason of misjoinder of charges.

One dead body and one dying man who died very shortly afterwards were brought to the Bogale hospital, which was in the charge of the appellant, a hospital assistant. He made *post-mortem* examinations of the two bodies and submitted two written reports of the results of the examinations and the causes of the death. Certain persons were tried at one trial on charges of committing murder by causing the death of the two persons whose bodies appellant had examined. The appellant gave evidence at the inquiry before the Magistrate, and at the trial before the Court of Session. He has been tried at one trial on six charges, two for making false reports on 8th April 1907 as to the causes of death, two for giving false evidence before the Magistrate on 30th May 1907 respecting the two bodies, and two for giving false evidence on the 19th August 1907 before the Court of Session respecting the two bodies.

If there had been only one murder I think the question of joinder of charges would present no difficulty. The joinder at one trial of charges of offences committed on 8th April, 30th May and 19th August in respect of one dead body is provided for by section 235 (1) of the Code of Criminal Procedure. Illustrations (e) and (f) leave no doubt on the point, and if further authority be wanted it is found in the analogous cases of *Emperor v. Sherufalli Allibhoy* (1), *Nga Ta Pu v. King-Emperor* (2), and *King-Emperor v. Nga To* (3). The whole of the proceedings in respect to the investigation of one murder and the prosecution of the offenders is one transaction within the meaning of section 235 (1).

But it is not so clear whether the proceedings in respect to two murders committed by the same person at the same time constitute one transaction. If they do, then the proceedings in respect to twenty murders committed at the same time by the same persons would come under the same rule. It would obviously be embarrassing to an accused person to be tried at one trial for evidence given in respect of twenty dead bodies, even though the evidence was contained in one deposition.

On the other hand it might be argued that the whole of the false evidence given in one deposition constitutes only one offence. There is authority for this view in the proceedings of the Madras High Court of 1st May 1871 (4). In that case there were two pieces of evidence on distinct matters, and given at different stages of the trial. If that be good law then the first and second charges relating to false evidence given on 30th May comprise only one offence, and the third and fourth charges relating to 19th August also comprise only one offence.

But whether this be so or not, there remain the fifth and sixth charges relating to the false reports submitted on 8th April. I find some difficulty in saying that they are part of one series of acts so connected together as to form the same transaction. If nobody had been prosecuted for the murder and hospital assistant had never given evidence, could it be said that the acts of writing the two reports were acts so connected together as to form one transaction? No doubt appellant could be tried at one trial for making the two false reports, but that would be under section 234 of the Code of Criminal Procedure, whereas unless the two reports can be said to relate to one transaction the charges for giving false evidence could only be joined with the other charges under section 235 (1). This brings into question the very point on which Fox, J., and I differ in *Nga Lun Maung v. King-Emperor* (5). As our observations were *obiter dicta* the learned Chief Judge express no opinion on the point whether every combination of two charges must be justified by one and the same section of the Code. If two offences under section 193 can be committed in one deposition (in other words, if the charges in this case were correctly framed), I should be inclined to say that there is no section of the Code of Criminal Procedure which justifies the inclusion

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(1) (1902) I.L.R. 27 Bom., 135.  
(2) 2 L.B.R., 19.  
(3) 2 L.B.R., 23.

(4) 6 Mad. H.C.R., XXVII, (Case  
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(5) 2 L.B.R., 10.

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at one trial of the charge of making a false report about the death of Po Thein and giving false evidence about the death of Pan Gaing.

The question appears to be one of considerable difficulty. I therefore refer to a Full Bench the question—

“ In the case under appeal, is the trial invalidated by the joinder of six charges, one under section 201 and two under section 193 relating to a report and evidence about the death of Po Thein, and one under section 201 and two under section 193 relating to a report and evidence about the death of Pan Gaing ? ”

*The opinion of the Bench was as follows :—*

*Irwin, Offg. C.J.*—In this case I think it will conduce to clearness of ideas if I first consider the question whether two separate charges of giving false evidence may properly be framed in respect of two distinct parts of one and the same deposition.

In the proceedings of the Madras High Court (4) mentioned in my order of reference the Sessions Judge reported that the perjury of which the prisoner had been convicted was a second piece of false evidence given in the same deposition and on the same occasion as the perjury for which he had been convicted as a former trial, but the two pieces of evidence were on distinct matters and given at different stages of the trial. The decision of the High Court was this :—

It appears to the High Court that the making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and that charges of false evidence cannot be multiplied according to the number of false statements contained in the depositions. They are merely instances of the offence. Testing it by the law of evidence, the whole deposition must be looked at, if desired, and one part qualified by the other. The prisoner has therefore been twice tried and convicted of the same offence. The falsity of the second statement was proper evidence at the first trial, but there were not offences.

The point which engaged their Lordships' attention was that there had been two trials, two convictions, and two sentences. To my mind the correct way of regarding the matter is this. Every lie in the deposition constitutes a distinct offence, and may be charged separately, but the whole depositions comes, at any rate in most cases, within the terms of section 71, clause (1), of the Penal Code, and therefore not more than one punishment could be inflicted for the whole. In the present case, whether the evidence relating to the death of Po Thein and the evidence relating to the death of Pan Gaing, in one deposition, come within the terms of section 71 is a question which need not be decided. Whether they do or do not, I have no doubt that the framing of two distinct charges in respect of one deposition is lawful and the joinder of those two charges at one trial would be justified by either section 234 or 235 (1) of the Code of Criminal Procedure.

I now come to the question referred. I think it is quite plain that the joinder of the six charges at one trial was not legal unless all the six offences were committed in one series of acts so connected together as to form the same transaction. The chief difficulty is occasioned by the joinder of the two charges under section 201.

In *Queen-Empress v. Fakirapa* (6), Birdwood, J., referred to three classes of cases mentioned in the illustrations to section 235 (1) of the Code of Criminal Procedure. The first class is obviously irrelevant here. The second class comprises cases where several offences are committed at the same time. This also affords no help; even if it covered the two *post-mortem* reports it would not cover those reports *plus* the perjuries. The third class is "where, though an interval of time may elapse between the several offences, the same specific criminal intent is common to them all, as in illustrations (e) and (f)." Now there was no doubt one common intent in the three offences alleged to have been committed in respect of the death of Po Thein, but can it be said that that intent was the same intent which inspired the offences in respect of the death of Pan Gaing?

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The fifth charge was framed thus by the Magistrate: "That you on or about 8th April 1907, knowing or having reason to believe that a capital offence had been committed against Po Thein and Pan Gaing, did, with the intention of screening the offender or offenders, to wit the accused in Sessions Trial No. 27 of 1907 . . . . from legal punishment, gave information respecting the offence, to wit your reports of the causes of death of Po Thein and Pan Gaing . . . ." The Sessions Judge saw that there was a defect in this charge, inasmuch as two capital offences had been committed. He struck out of the fifth charge all reference to Pan Gaing, and he framed a sixth charge in these words: "That you, on or about 8th April 1907 having reason to believe that Maung Pan Gaing had been murdered, did, with the intention of screening the offenders, give information which you believe to be false, namely, your reports D and G." D is the report in Police Form 75, used either for injuries to living persons or for cause of death in case of dead bodies. G is the report of the *post-mortem* examination in Medical Miscellaneous Form No. 25. Both are dated 8th April.

Eight persons were committed for trial for the murders of Po Thein and Pan Gaing, but it is immaterial whether there were eight or one.

There were two distinct murders, for which distinct sentences could be passed, and they were tried together because the two murders were committed at one time in the same transaction (section 239). The transaction or transactions with which we are now concerned are not the murders nor the quarrel in which the murders were committed, but something which followed after the murders. When two bodies were brought to appellant in the hospital he had certain duties to perform in respect of them, and I think it is immaterial that the bodies were brought at the same time and by the same persons and also immaterial that the law allowed the persons accused of the two murders to be tried at one trial. The intent which would include appellant's acts in one transaction was the intent to screen the offenders, but the intent to screen the murderers of Po Thein was, in my opinion, distinct from the intent to screen the

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murderers of Pan Gaing. The Sessions Judge must have seen the distinction when he divided the fifth charge into two. It follows then that the act of submitting a report about Po Thein's death was not so connected with the act of submitting a report about Pan Gaing's death as to form the same transaction. And it follows that there is no section in the Code which would justify the joinder at one trial of the charges under section 193 of giving false evidence about the death of Pan Gaing with the charge under section 201 of making a false report of the cause of the death of Po Thein.

I would therefore answer the question referred in the affirmative, and say the trial is invalidated by the joinder of the six charges.

*Hartnoll, J.*—It is unnecessary to again set out the facts as they have already been set out in the order of reference.

In view of the ruling of their Lordships of the Privy Council in the case of *Subrahmania Ayyar v. King-Emperor* (7), it must be held that if there has been any error in the joinder, such error cannot be remedied by the application of section 537 of the Code of Criminal Procedure, and therefore the sole point for consideration is whether the joinder is justified by the provisions of the Criminal Procedure Code. Section 233 of that Code lays down the general rule. Sections 234, 235, 236 and 239 contain the exceptions to it. Sections 236 and 239 are not applicable to the present case, and so it only remains to consider sections 234 and 235. In my opinion the joinder cannot be justified by section 234, as it only applies to offences under the same section of the Indian Penal Code or of any special or local law, and in this case two of the charges are under section 201 of the Indian Penal Code and four are under section 193 of the same Code. I am of opinion that, whatever may be the number of charges, if one of them is under a different section to the others, the joinder can in no case be justified by the application of section 234.

It seems to me that the joinder, if justifiable at all, can only be justified under section 235 (1), and that the only question for consideration is whether the six charges referred to one series of acts so connected together as to form the same transaction. If it can be shewn or inferred that they do, the joinder is legal; if it cannot be, it is illegal. If it were proved that for some motive and in furtherance of it the accused committed offences under sections 201 and 193 of the Indian Penal Code, I consider that section 235 (1) would apply. For instance, if it were proved that a representative of the relations of the accused persons in the murder cases, which were tried together and which seem to have arisen from a series of acts so connected together as to form the same transaction, had gone to the accused in the present case and had offered him a bribe, which was accepted, to give false reports of the causes of death of the two persons and to give false evidence about the same in due course, then I am of opinion that the making of the false reports and the giving of the false evidence would be in one series of acts so connected together as to form the same transaction. The doing so would be carrying out the conditions under

(7) (1901) I.L.R. 25 Mad., 61.



which the bribe was accepted. The bribe would be the connecting link. But in the present case I can find no such connecting link. The evidence for the prosecution is merely to prove that the reports were false within the meaning of section 201 of the Code and that false evidence was given within the meaning of section 191 of the same Code. There may have been some motive in consequence of which the various offences were committed, if the accused is guilty; but such motive cannot in my opinion be assumed. It may have existed; it may not. To justify a joinder under section 235 (1), it must be clear and apparent, and in that case it would be the connecting link. In its absence I am of opinion that the report concerning the cause of Po Thein's death and that concerning the cause of Pan Gaing's death cannot be held to be two of a series of acts so connected together as to form the same transaction and that therefore the joinder cannot be justified by section 235 (1) of the Code. It seems even doubtful to me whether in the absence of the connecting link the report regarding Po Thein and the giving of evidence as to the cause of his death can be held to form part of the same transaction, and the same observation applies to Pan Gaing; but I need not come to a definite decision on the point, as I have already found that the joinder is not legal.

With reference to the point as to whether more than one offence under section 193 of the Indian Penal Code can be committed in the same deposition, section 191 runs:—"Whoever being legally bound by an oath . . . . makes any statement which is false . . . . is said to give false evidence." Each and every false statement in a deposition would seem to me to be an offence under section 191. I concur with the learned Chief Judge in considering that the first part of section 71 of the Indian Penal Code would apply in most cases to a deposition containing false evidence. Illustration (a) to section 71 seems to provide an analogous case. It is unnecessary to decide whether section 71—part one—would apply to the depositions in the present case, if false statements were made with respect to both Po Thein and Pan Gaing.

I answer the question referred in the affirmative and say that the trial is invalidated owing to misjoinder.

*Ormond. J.*—I would answer the question referred in the affirmative, for the following reasons:—

It is not apparent, nor can it be inferred from the charge, that the several offences were committed in a series of acts forming one transaction; or, in other words, were committed in furtherance of one object or with one intention.

The giving of the false evidence is in effect nothing more than a substantiation on oath of the false reports; and the false report is but a preliminary step towards the subsequent offence. If the charges were confined to the making of false reports and the giving of false evidence as to the cause of one death only, the accused's intention must be presumed to have been one throughout, *viz.*, to screen the same person or persons from the consequences of one criminal

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transaction. And such joinder of charges would be good under section 235 (1) of the Code of Criminal Procedure.

The first four charges imply that there was but one trial for the two murders; but this does not show that the two murders were committed at the same time or by the same persons. The trial might have been held under section 234 of the Code of Criminal Procedure; and I understood from the Government Advocate that all the accused in the murder case were not charged with both the murders. The accused's intention therefore might have been to screen different persons in respect of each murder, and the two murders might not have formed one criminal transaction.

And sections 234 and 135 (1), Criminal Procedure Code, are, I think, intended to be alternative and not cumulative in their operation, *i.e.*, three sets of offences (relating to different acts), each set being unconnected with the other sets, but comprising different offences connected together so as to form one transaction, though the offences in each set are of the same kind as the offences in the other sets, cannot be joined together in one trial.

In my opinion, therefore, the trial is illegal owing to the joinder of these six charges.

Criminal  
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ence No. 3  
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#### Full Bench—(Criminal Reference.)

Before Mr. Justice Irwin, C.S.I., Officialing Chief Judge,  
Mr. Justice Hartnoll, and Mr. Justice Ormond.

#### MESHIDI KHAN v. RANGOON MUNICIPAL COMMITTEE.

Giles—for applicant. | Eddis, Lentaigne and Jordan—for respondent.  
Taking cognizance—Complaint—Information—Criminal Procedure Code, ss.  
190 (1) (a) and (c), 537 Burma Municipal Act, s. 195.

A complaint, as defined under section 4 of the Code of Criminal Procedure, was presented by the complainant to a Magistrate, who recorded that he took cognizance of the case under section 190 (c) of the Code.

*Held*,—that the Magistrate really took cognizance under section 190 (1) (a) of the Code.

*Per Ormond, J.*,—If the Magistrate was competent to take cognizance under section 190 (1) (c), he must be deemed to have so taken cognizance. In the present case the Magistrate was not so competent, because the complaint was of an offence under the Municipal Act, section 195 of which bars the taking of cognizance except upon complaint. The Magistrate therefore took cognizance under section 190 (1) (a).

*King-Emperor v. Po Chon*, 2 L.B.R., 311; *King-Emperor v. Po Nun*, L.B.R., 44; referred to.

The following reference was made to a Bench by Mr. Justice Irwin:—

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The petitioner was prosecuted by the Municipal Committee of Rangoon for an offence under the Burma Municipal Act. The complaint was presented to the District Magistrate, who enfaced it with a rubber stamp in these terms, "I take cognizance of this case under section 190 (c) of the Criminal Procedure Code, and transfer the case for enquiry to the Honorary Magistrates' Bench." This was signed by

the District Magistrate, and the complaint was made over to the Honorary Magistrates, who disposed of it. The accused was convicted and fined Rs. 50. He appealed to the District Magistrate, who dismissed the appeal.

The present application is for revision of the proceedings on several grounds. I shall at this stage refer to only two of those grounds, namely those marked (i) and (iii).

The first is that the District Magistrate exceeded his jurisdiction in taking cognizance of the case under section 190 (c), and the other is that the Honorary Magistrates exceeded their jurisdiction in issuing process without first examining the complainant on oath. These objections were not raised either at the trial or in the appeal. They seem to be mutually inconsistent, for if the District Magistrate took cognizance of the offence under clause (c) the Honorary Magistrates were not required by any provision of law to examine the complainant before issuing process. At the hearing it was the first ground that was pressed. It is not alleged that the District Magistrate is not empowered to take cognizance under clause (c), but it is enacted by section 1, sub-section (2), of the Code of Criminal Procedure that nothing contained in that Code shall affect any special form of procedure prescribed by any other law for the time being in force, and by section 195 of the Burma Municipal Act that no Court shall take cognizance of any offence punishable under that Act or any rule or bye-law thereunder except on the complaint of the committee or of some person authorized by the committee in this behalf.

If the District Magistrate really took cognizance of the offence under clause (c), it is clear that he was not empowered by law to do so, and his proceedings are void under section 530 (k), Code of Criminal Procedure. But did he so take cognizance?

If the matter were *res integra* I should have no hesitation in saying that cognizance was not taken under clause (c), because the Magistrate took cognizance "upon receiving a complaint of facts which constitute such offence." These are the exact words of clause (a) of section 190 (1). If the District Magistrate had recorded that he took cognizance of this offence under clause (b), I do not think any one would venture to contend that he had really done so. The contention seems to me to be equally untenable when the District Magistrate records that he took cognizance under clause (c). I cannot see how the subsequent omission to examine the complainant can effect the fact that cognizance was taken on receiving a complaint of facts which constitute the offence.

But in the case of *King-Emperor v. Po Chon* (1), the late Chief Judge of this Court said:—

In taking cognizance of an offence on the report of a revenue surveyor, the Magistrate must proceed either under clause (a) or under clause (c) of section 190, sub-section (1), of the Code of Criminal Procedure. If he proceeds under clause (a) he must examine the complainant, and so forth.

(1) 2 L.B.R., 311.

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If that be correct I think it disposes of this case. As I do not see my way to agree with it I must refer the point to a bench.

Meantime I think it will be convenient to consider the other points in the case, on the assumption that the District Magistrate took cognizance of the offence on complaint.

The omission to examine the complainant is covered by clause (a) of section 537 of the Code of Criminal Procedure. It did not occasion any failure of justice, and would have been no obstacle to the case proceeding even if the objection had been raised at the commencement of the trial. *A fortiori* it is no ground for interference now. See the explanation to section 537.

Another of the objections urged by Mr. Giles is that as the accused could, under section 191 of the Code of Criminal Procedure, have objected to being tried by the District Magistrate, the District Magistrate was incompetent to try the appeal. If the District Magistrate took cognizance under clause (a) the objection fails. If he took cognizance under clause (c) it equally fails, because the accused did not object to the District Magistrate trying the appeal.

Mr. Giles' next objection is a most sweeping one, namely, that the Burma Municipal Act has no operation in the Town of Rangoon, but only in a few outlying strips of land. His argument is this. Section 5 of the Burma Municipal Act, 1898, continued in existence the Municipalities which had been established under the Burma Municipal Act, 1884. Under the Act of 1884 the Municipality of Rangoon was defined as the area which had been previously defined as the Municipality of Rangoon under the Act of 1874 in General Department Notification No. 192, dated 27th December 1876. The notification by which the Municipality was in point of fact defined was Revenue Department Notification No. 192, dated 27th December 1876. Because the word "General" was by mistake substituted for "Revenue" in Notification No. 1, dated 2nd January 1885, the learned advocate asks me to hold that the last named notification is wholly void and inoperative, and the Rangoon Municipality has been for the last twenty-two years a mere figment of the imagination. It is difficult to suppose that this argument was intended to be taken seriously. It cannot be entertained for a moment.

The remaining objections relate to the nature of the offence complained of, and the terms of the judgment.

The complaint is in these terms: "That the accused abovenamed was on the 28th March 1907 served with a notice under section 93 (2) of the Burma Municipal Act, 1898, and with a subsequent reminder of 20th May 1907, which required him to within thirty days from the date of his receipt thereof remove the covering that he had placed over the five feet passge between his buildings Nos. 48 and 44 in Fraser junction of Maung Taulay Street as the said passage is required to be left entirely open to the sky under direction No. 19 and bye-law No. 23 of the Act. That he has failed to comply with the said notice and reminder." The prayer is for a summons under sections 93 (2) and 180 of the Act.

The prosecution put in a copy of directions which were given to the accused on 8th December 1905, under sub-clause (2) of section 92 of the Act. Most of the directions are printed, but the only one which is now in question is part of No. 19, which is in manuscript, namely, "19. The passage behind the building in Fraser Street must not be covered but be open to sky." The prosecution also put in a copy of the notice served on the accused on 28th March 1907: the material parts of which are as follows:—"Whereas you have erected two 3-storied pucca buildings . . . . in <sup>contravention of</sup> directions and bye-law Nos. 19 and 23, respectively, of the directions and bye-laws framed under section 93 of the Burma Municipal Act, 1898, issued to you in respect of the above-pescribed building: Notice is hereby given you that the Municipal Committee require you to alter the said building within 30 days from date of your receipt hereof. The alterations you are required to make are:—The 5 feet passage behind the building in Fraser Street must not be covered over but must be open to the sky (Direction No. 19 and by-law No. 23)."

The conviction is in these words, "Not altering the building according to bye-law No. 23 and direction 19, Sections 93 (2), 180, Municipal Act." The conclusion of the judgment is as follows:—"Mr. Banurji's argument is that the committee have no power to substitute the direction 19, and it is not operative in law. But the complainants have such power under section 92 (2) of the Act. We are satisfied that the accused built his house in contravention of bye-law 23 and direction 19, and he has failed to alter the same as ordered by the complainants."

One objection of the petitioner is that No. 23 of the bye-laws framed under section 93 does not require any space to be left open to the sky. Respondent's counsel did not rely strongly on this bye-law, and I think it is clear that the objection is sound.

The next objection is that as the complaint prays for a summons under section 93 only, the bench had no jurisdiction to try the accused for an offence under section 92. Mr. Giles contended that section 195 of the Burma Municipal Act renders section 246 of the Code of Criminal Procedure totally inapplicable to trials of offences under the Municipal Act. I am unable to take this view. Doubtless the complaint in the present case would not give the bench jurisdiction to try the accused (*e.g.*) under section 174 for picketing bullocks on the public street, but as the complaint gives the accused full notice of the facts alleged against him, I have not the least doubt that the Court has jurisdiction to try him and convict him of any offence constituted by those facts or any of those facts, no matter what section may have been rightly or wrongly cited in the complaint, or even if no section were so cited. So far as section 190 (1) (a) is concerned no mention of any section is required. What the section requires is facts. It is the Magistrate's duty to say whether the facts alleged constitute an offence.

The formal finding in this case is not quite accurate; it quotes a wrong section. But the judgment leaves no room for doubt that the

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conviction was for disobeying the direction issued under section 92. The mention of the bye-law was mere surplusage, though it was based on a misconstruction of the bye-law. From beginning to end of the case there was no sort of ambiguity or vagueness in anybody's mind above the nature of the act complained of. What accused put forward in his appeal was that the committee had no power to substitute direction 19 under section 92 for the bye-law under section 93. This ground was not taken before me, and is clearly untenable. The direction is well within the powers conferred by section 92, sub-section (2), clause (c).

The last objection is that direction 19 was not in point of fact disobeyed, because the passage was only partly covered over. Assuming that the fact is so, I am of opinion that a partial covering over of the passage is a distinct violation of the direction.

It only remains for me to say that my finding about the effect of neglecting to examine the complainant must not be read as countenancing a continuance of that practice in cases under the Municipal Act. The practice is illegal, and must be discontinued. Moreover, the provisions of the law in this respect are most salutary, and as necessary. In municipal cases as in any others. In *King-Emperor v Po Nan* (2), I made some remarks about the method of instituting municipal prosecutions. The officer authorized to prosecute obviously ought to be some departmental officer acquainted with the facts. He is the person to be examined under section 200 of the Code of Criminal Procedure.

I refer to a bench, under section 11 of the Lower Burma Courts Act the question :—

"When a complaint, as defined in section 4 of the Code of Criminal Procedure, is presented by the complainant to a Magistrate, and the Magistrate records on it that he takes cognizance of the case under section 190 (c) of the Code of Criminal Procedure, has the Magistrate taken cognizance of it under clause (a) or under clause (c) of sub-section (1) of section 190."

July 27th,  
 1908.

*The opinion of the Bench was as follows :—*

*Irwin, Offg. C.J.*—The opinion I expressed in making this reference has not been changed by the arguments addressed to us by Mr. Giles. He does not contend that the information contained in a document which is a complaint as defined in section 4 (1) (h) of the Code of Criminal Procedure can be regarded as information received under section 190 (1) (c). The expression "information received from any person other than a police officer" clearly means only such information as does not constitute a complaint nor a police report.

What Mr. Giles asked us to say is this. The complaint in this case is a real complaint as defined in the Code, and it was received by the District Magistrate, but he did not take cognizance of the offence on receiving the complaint, but on some information which must have reached him independently of the complaint. We are asked to infer

this simply and solely from the fact that the District Magistrate signed an endorsement made by a rubber stamp in which endorsement it is stated that he took cognizance under clause (c) of section 190.

I cannot assent to that view of the case. The endorsement is stamped on this complaint, and it commences, "I take cognizance of this case." To say that the Magistrate did not take cognizance of an offence on receiving a complaint of facts which constitute the offence would, to my mind, be about on a par with saying that 2 and 2 do not make 4.

My answer to the question referred is that the Magistrate has taken cognizance under clause (a) of section 190 (1).

*Hartnoll, J.*—I concur in the answer proposed by the learned Chief Judge. It seems to me that beyond doubt the District Magistrate took action on a complaint as defined in section 4 (1) (b) of the Code of Criminal Procedure. Section 190 (1) of the Code lays down three ways of taking cognizance of an offence :—

- (a) upon receiving a complaint of facts which constitute such offence ;
- (b) upon a police report of such facts ;
- (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.

There is nothing on the record to show that the District Magistrate took cognizance upon information received from a person other than a police officer or upon his own knowledge or suspicion that an offence has been committed.

It is clear that he took cognizance on receiving a complaint, and the fact that he noted that he took cognizance under section 190 (1) (c) cannot be held to show that he did do so when he really took cognizance under section 190 (1) (a). If it is true, as is alleged, that this is a device adopted so as to evade the examination of the complainant on oath, it should cease, and the correct procedure should be adopted for the future.

*Ormond, J.*—A complaint was submitted to the District Magistrate, who recorded thereon the fact that he took cognizance of the offence under section 190 (1) (c) of the Code of Criminal Procedure. The question referred is :—Has the Magistrate taken cognizance of it under clause (a) or clause (c) of section 190 ?

The answer, I think, must depend upon circumstances. If the Magistrate had jurisdiction to take cognizance of the offence either under clause (a) or clause (c) he must be deemed to have taken cognizance of the offence under clause (c) as stated by him. Ordinarily when a complaint is submitted, the Magistrate would take cognizance of the offence under clause (a) ; but the fact that a complaint has been submitted to a Magistrate does not, in my opinion, preclude the Magistrate from taking cognizance of the offence under clause (c) provided he exercises a sound discretion. Suppose a forest officer or revenue surveyor sends in a report of an offence and then dies or is unavailable for examination on oath, the Magistrate (if empowered)

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could take cognizance of the offence under clause (c), if he thought fit.

In the present case the Magistrate, under the Municipal Act, had no jurisdiction to take cognizance of this offence except under clause (a). In these circumstances I think the Magistrate must be deemed to have taken cognizance of the offence under clause (a).

The question whether the subsequent proceedings are vitiated in consequence of the complainant not having been examined on oath, is not before us.

I find nothing to dissent from in the case of *King-Emperor v. Po Chon* (1), referred to in the order of reference as necessitating this reference. In that case the Chief Judge (Sir Thirkell White) points out the proper method of procedure in a trial for an encroachment on grazing lands, and gives a correct exposition of some provisions of the Criminal Procedure Code. And the conviction was set aside on the ground that it could not be supported on the evidence.

*Final order on the application for revision :—*

July 29th,  
1908.

*Irwin, Offg. C.J.*—In accordance with the finding of the Full Bench on the point of law which I referred, and in accordance with my own finding on other points in my order of 24th January 1908; I dismiss the application.

Criminal  
Appeal  
No 391 of  
1908.

*Before Mr. Justice Hartnoll and Mr. Justice Ormond ; and referred to Mr. Justice Irwin, C.S.I., Officiating Chief Judge.*

### PO TU v. KING-EMPEROR.

July 28th and 30th, 1908. *Murder—Nature of injury caused—Means of ascertaining intention of accused—Indian Penal Code, s. 300.*

A cut Z on the head with a heavy chopper, slicing off a bit of the frontal bone and cutting the brain. Z died from the effect of injury, but the medical evidence showed that the wound was not certain, although likely to cause death.

*Held*,—that A's intention must be inferred not merely from the actual consequences of his act, but from the act itself ; and as the natural consequence of an act of the kind in question would be death, A must be presumed to have intended to cause death.

*Shwe Ein v. King-Emperor*, 3 L.B.R., 122, referred to.

*Ormond, J.*—There can be no doubt about the facts of this case, which are as follows :—The appellant Po Tu and Po Shwe are cousins and brothers-in-law and are both of them grandsons of the deceased Shwe Thin. Po Tu abused Po Shwe and followed him up into the house of Shwe Thin in the evening about dusk. Shwe Thin was sleeping in the verandah ; Po Shwe woke him up and told him that Po Tu was following him to cut him with a *da*. Shwe Thin said, " He, Po Tu, what is it ? " whereupon Po Tu cut Shwe Thin on the right side of the forehead with his *da* and ran away. Deceased's wife Ma Pu, his son Po Thwe, and his daughter Ma Me were making pots at the end of the house. Ma Me and Po Thwe heard the abuse ; they saw Po Shwe run up into the house and Po Tu following him. They heard Po Shwe call out that Po Tu had cut Shwe Thin with a *da* ; and they arrived on the scene in time to see Po Tu go off down the steps. Ma Pu speaks

to Po Shwe calling out (as above) and she too saw Po Tu going away. They all three state that Shwe Thin said that Po Tu had cut him with a *da*. Maing Tauk Te (ten house *gaung*) at once arrested Po Tu near his house, when he had a *da* in his hand with fresh blood on it. The appellant's turban was found in Shwe Thin's house that night near the steps. There can be no doubt that appellant committed the deed. In his petition of appeal he states that he was drunk and was in his own house at the time. The deceased in his complaint states that Po Tu had been drinking toddy earlier in the day and was drunk.

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The wound was an oblique cut over the right eye slicing away the frontal bone to the extent of  $1\frac{1}{2}$  inches by  $\frac{1}{2}$  inch broad, and on clearing away the sliced bone it was found that the brain was cut. Shwe Thin died 10 days afterwards from diffused inflammation of the membranes of the brain and abscess of the brain, resulting from the injury. The medical evidence shows that the injury was likely, but not certain, to cause death. The learned Sessions Judge has found that the wound was in its nature likely to cause death. But this finding is not sufficient to support a conviction of murder. The accused must be found either to have intended to kill Shwe Thin or to have intended to inflict such bodily injury as is sufficient in the ordinary course of nature to cause death—*Shwe Ein v. King-Emperor* (1). A man though drunk must be deemed to intend the natural or necessary consequences of his act; but the medical evidence does not show that death was the necessary consequence of the wound, or that the injury was sufficient in the ordinary course of nature to cause death.

An injury that is merely likely to cause death is different to an injury which would in the ordinary course of nature cause death. The first would be a dangerous wound; the latter a necessarily fatal wound in the ordinary course of nature. The cut which causes merely a dangerous wound is a different cut to that which causes a necessarily fatal wound; though the difference in depth or position might be very slight.

A man is presumed to intend the natural or necessary consequences of his act; and in this case the accused's intention must be gathered solely from the one act of cutting, there being no premeditation and no other acts showing an intention to kill. If the accused's act had caused an injury which in the ordinary course of nature would cause death he would be presumed to have intended to cause such an injury; and he would then be guilty of murder. But the accused's act was to cause an injury that was merely likely to cause death, and such injury was the natural and necessary consequence of his act.

It might be said that the natural consequence of his act was the death of the deceased, and therefore he must be presumed to have intended to kill the deceased. To this I would answer that death was not the necessary result, in the ordinary course of nature, of the accused's act; and because the law in connection with culpable homicide draws a distinction between a dangerous wound and a necessary fatal wound, we must look to the nature of the wound which was the

(1) 3 L.B.R., 122.

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immediate consequence of his act. Moreover, if such were a legitimate presumption, in all cases where a dangerous wound results in death the accused must be deemed to have intended to cause death ; but the law draws a distinction between an intention to cause an injury that is likely to cause death, and an intention to cause death. So much for the legal presumption.

Would it then be necessary for a reasonable man to infer, from the nature of the act and the circumstances of the case, that the accused intended to cause death (as distinguished from an intention to cause an injury that is likely to cause death) ? I think not. In this connection the fact that the accused was drunk must be taken into consideration. The wound was an oblique slicing cut, not a straight cut at the head inflicted by the accused when he was drunk and in a passion and without any premeditation. In my opinion we should not be justified in presuming that the accused intended to inflict a straight cut, or to inflict a more severe wound than he actually did. It might with equal reason be presumed that the accused intended to strike the deceased on the head with the flat of his *da*.

For these reasons I think the offence is culpable homicide not amounting to murder. I would alter the conviction to one under the first part of section 304, Indian Penal Code, and I would alter the sentence to transportation for life.

*Hartnoll, J.*—I agree with my learned colleague that Maung Po Tu caused the injury to Maung Shwe Thin that resulted in his death. Maung Shwe Thin, in his information to the police, stated that Maung Po Tu had been drinking, and this was very probably the case. He commenced by abusing Po Shwe, and when the latter challenged him he went for Po Shwe with a chopper that is described as follows :—“Length of handle about one foot, blade about 11 inches, breadth of blade at broadest part 3 inches, weight 73 tolas.” Po Shwe ran on to Shwe Thin’s house. The latter was sleeping on the verandah. On Shwe Thin awaking and getting or sitting up, Po Tu struck him a blow with the chopper on the head. The medical evidence is to the effect that the wound was an oblique and incised one on the right side of the forehead commencing from the outer angle of the right eyebrow,  $2\frac{3}{4}$  inches long by  $\frac{3}{4}$  of an inch broad, and slicing away the frontal bone to the extent of  $1\frac{1}{2}$  inches by  $\frac{1}{2}$  an inch. The brain was also cut, and this cut was said to be  $\frac{3}{4}$  of an inch long by  $\frac{1}{2}$  inch broad. Maung Shwe Thin was cut on the 27th March, and he died on the 6th April. The *post-mortem* disclosed at the site of the wound a small abscess cavity from which pus gravitated into the base of the brain. Death is said to have been due to diffused inflammation of membranes of the brain and abscess of the brain resulting from the injury inflicted on the head. It was also said that the injury was likely, but not certain, to cause death.

The question is of what crime Maung Po Tu is guilty. The time of the occurrence seems to have been after dark ; but there was a light on the house where Shwe Thin was cut. Shwe Thin says in his statement to the police that there was a lamp on the wall of the house.

Ma Me says in her deposition at sessions that there was a tin lamp in the middle room, not in the verandah. Po Shwe to the Magistrates said: "There was no wall between the verandah and the main room. There was a light of ordinary bazaar tin lamp hanging over the wall near me. The light was then reflecting on the verandah." He had previously stated that he had gone into the main room. It therefore seems to me that any man in his ordinary sober senses could see where he was cutting when he dealt the blow that Po Tu did. Assuming that he was in liquor, for the purpose of determining his knowledge or intent, he must be considered to have been sober, for, according to section 86 of the Indian Penal Code, a person who does an act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. The question, therefore, is what intention had Po Tu sober when he aimed a blow at Shwe Thin's head with a chopper of the size and weight described above, and what is the legal presumption as to his intention? My learned colleague would gauge it from the nature of the injury inflicted on Maung Shwe Thin. I am of opinion that that is not the correct manner in which to gauge it. Very often the nature of the injury inflicted affords most valuable evidence as to what the intention was; but in my opinion it is not the only way of gauging intention. Every case must be taken on its merits. Intention must almost always, if not always, necessarily be a state of mind prior to the actual act being accomplished. The law recognized this in paragraph 3 of section 330 of the Indian Penal Code, where it does not say the bodily injury inflicted but the bodily injury intended to be inflicted. The act here is one of aiming at and cutting the head of another man with a most formidable chopper. Before Po Tu aimed and cut, he must have had this intention. He followed up his intention with the cut, and death ensued in consequence. Every man must be presumed to intend the natural or necessary consequences of his own act. What is the natural consequence of aiming at and cutting the head of another with this formidable chopper? In my opinion it would be death. We must presume that Maung Po Tu meant to give Shwe Thin a fair and square blow on his head. His conduct was such prior to his giving this blow as is in my opinion sufficient to allow this presumption to be drawn. He was in a quarrelsome and savage mood. I cannot for a moment think that he merely meant to slice off a bit of the frontal bone, or to cut off a bit of the ear, or to strike with the flat of the chopper, in which cases it might be held that he did not intend to cause death. I must hold that he meant to give an ordinary fair and square cut on the head.

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The fact that he merely sliced off a bit of the frontal bone and did not cause death on the spot cannot in the present case, in my opinion, be a guide in determining his intention. He may have made a bad shot. Maung Shwe Thin may have moved. The making a bad shot, the moving of Shwe Thin, would be elements that could not enter into his intention. His intention was fixed before, and at the time of dealing the blow, and as I have said before I consider his intention

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must be taken to be the dealing of an ordinary fair and square cut on Maung Shwe Thin's head with the formidable chopper before the Court. The natural consequence of such a blow would, in my opinion, be death. I therefore find that Maung Po Tu cut at Shwe Thin with the intention of causing his death; and as death ensued in consequence I would find him guilty of murder. With regard to the sentence it does not seem that there was any great provocation. Po Tu was in a quarrelsome and savage mood. He objected to Po Shwe's lending a *maunglet* and abused him. Po Shwe dared him, and then when Po Tu went for him he ran away. The act ensued. I would confirm the sentence of death.

As my learned colleague and myself hold different opinions the case will be laid before the learned Chief Judge under section 429 of the Code of Criminal Procedure.

*Irwin, Offg. C.J.*—There is no doubt about the external facts in this case. The appellant on 27th March cut his grandfather Po Shwe Thin on the head with a heavy chopper, slicing off a bit of the frontal bone  $1\frac{1}{2}$  inches long by  $\frac{1}{2}$  inch broad, and cutting the brain. He died on the 6th of April of diffused inflammation of membranes of the brain and abscesses of the brain resulting from the injury caused by the chopper. His life was in danger from the first, but the injury was not certain to cause death.

There is no doubt that the appellant caused Po Shwe Thin's death. The only point on which my learned colleagues have differed is the intention which should be imputed to the appellant by inference from the proved facts.

I do not think it is necessary to dissent from the proposition that in this particular case the accused's intention must be gathered solely from the one act of cutting, but I cannot agree that it must be gathered solely from the effects of that act as disclosed in the medical evidence. Such an inference necessarily implies that the accused intended to cut a slice off his grandfather's head of the precise size that he did in fact cut off, without varying a hair's breadth one way or the other. Not one man in a million is capable of doing that. Suppose the accused had taken the chopper with both hands and struck with sufficient force to cleave the skull from forehead to chin, but had missed his aim and only slightly grazed the forehead, would it be possible to avoid the inference that he intended to cause death? Or suppose a man fires a bullet at another, misses his heart by an inch or two, and pierces the lung. A bullet wound through a lung, I believe, is not necessarily fatal, but if in the case I put it did prove fatal, I have no doubt that the crime would be murder.

In the present case then I would infer the accused's intention from his act, but not solely from the consequences of that act. I think it is a matter of common knowledge that the result of cutting a man on the head with a heavy chopper is generally death, and the appellant must be held to have known that that is the natural consequence of such an act; and he must therefore be presumed to have intended to cause death.

Section 86 of the Penal Code does not establish any presumption of law relating directly to intention, but it binds us to treat the appellant as having the same knowledge as he would have had if he had been sober, and intention in this case is an inference from knowledge.

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For these reasons I think the conviction of murder is correct. No provocation of any kind was given by the old man. I think the sentence of death should be confirmed.

The result is that appeal of Nga Po Tu will be dismissed.

*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge, and  
Mr. Justice Ormond; and referred to Mr. Justice Hartnoll.*

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Appeal No.  
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1908.

#### KYAW WE v. KING-EMPEROR.

*Attempt to murder—Nature of injury caused—Means of ascertaining intention of accused—Indian Penal Code, s. 307.*

August 7<sup>th</sup>  
1908.

It is not essential, to justify a conviction under section 307 of the Indian Penal Code, that bodily injury capable of causing death should actually have been inflicted. Although the nature of the injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds.

*Shwe Nwe v. Queen-Empress, S.J., L.B., 466, overruled.*

*Irwin, Offg. C.J.*—There is no doubt at all about the facts of this case. Myat Pu was sitting in the house of Po Se, when appellant Kyaw We came in on some business. He asked for a *da* to cut fire-wood, and Po Se said he had none. Myat Pu pointed to a *da* which was lying on the floor. Kyaw We took it up and went into the house. A few moments later Kyaw We attacked Myat Pu from behind, and cut him first on the neck and then on the shoulder blade. Kyaw We was then seized by Lun Bye, and after a struggle which lasted some time was disarmed by Lun Bye and Po Se. Accused's defence that Myat Pu pulled his hair and he only waved the *da* is obviously untrue.

The cut on the neck was  $1\frac{1}{2}$  inches deep, and reached down near the spine. The other cut sliced the shoulder blade to a length of about half an inch. Neither of the wounds endangered life, and Myat Pu was less than 20 days incapacitated from following his ordinary pursuits.

The Magistrate, after consulting some dictionaries, came to the conclusion that the slicing of the shoulder blade was not a fracture within the meaning of section 320, seventhly, Penal Code, and he therefore framed a charge of causing hurt by a *da*, section 324, but he subsequently added a charge of an offence under section 307, Penal Code, and convicted the appellant on that charge.

In my opinion slicing of the bone is a fracture, and the wound on the shoulder constituted grievous hurt; but that is a minor point.

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The Magistrate in his judgment referred to the case of *Nga Shwe Nwe v. Queen-Empress* (1), which was very similar to the present case except that the injuries were more severe ; one cut fractured the skull, another cut through the cheek into the mouth, and a third was on the shoulder, an inch deep. There was no evidence that the wounds were dangerous to life and therefore the learned Judicial Commissioner held that accused could not be presumed to know that by his acts he was likely to cause death, and that therefore he could not be convicted of either attempt to commit murder or attempt to commit culpable homicide, and he altered the conviction to voluntarily causing grievous hurt. The head note to the report is in these words : "In the absence of any evidence to show that the wounds inflicted by the accused on the complainant are dangerous or likely to cause death, the accused cannot be convicted of attempt to murder (section 307 of the Indian Penal Code) or attempt to commit culpable homicide (section 308 of the Indian Penal Code)." This seems to be a correct precis or the ruling.

The Magistrate, while noticing this ruling, disregarded it, and his finding plainly conflicts with it. In the absence of any ruling of the Chief Court the Magistrate was bound by that of the Judicial Commissioner, and was not at liberty to set it at naught.

But in my opinion the Judicial Commissioner's judgment does not contain a correct exposition of the law. The offence which is called shortly in the marginal index to section 307 "attempt to murder" does not depend at all on the nature of the hurt actually inflicted. It is an offence which may be committed without inflicting any hurt at all. This is clear even from the first illustration to the section :—"A shoots at Z with intention to kill him under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section." Obviously the offence is complete even if the bullet misses Z altogether. It is true that in most cases the nature of the wounds are of considerable assistance in coming to a finding as to the intention with which the accused acted, but the intention may be ascertained in some cases without reference to the wounds at all.

In the present case the first wound narrowly missed cutting the spine. The accused attacked Myat Pu in a treacherous manner from behind without any provocation and without even the shadow of an altercation. He gave Myat Pu a very severe cut on the neck, and cut him again after he fell. The act of inflicting a deep cut on the neck is an act capable of causing death, and everybody knows that it is very likely to cause death. The correct inference from the facts is, in my opinion, that the appellant intended to cause bodily injury sufficient in the ordinary course of nature to cause death. I think the conviction of an offence under section 307 is fully justified.

The sentence of seven years' transportation is appropriate. I would dismiss the appeal.

(1) S.J., L.B., 466.



As my learned colleague does not agree with me, the appeal will be laid before Mr. Justice Hartnoll, under section 429 of the Code of Criminal Procedure, for disposal.

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*Ormond, J.*—There can be no doubt that the appellant inflicted the injuries as alleged; but in my opinion the conviction under section 307 of the Indian Penal Code cannot be sustained. Under section 307 the act must be such as would in the ordinary course of events have caused death or would be likely to have caused death. Here the appellant's act was causing an injury which was not capable of causing death. I would alter the conviction to one of voluntarily causing grievous hurt by a dangerous weapon, under section 326 of the Indian Penal Code, and I would confirm the sentence.

*Hartnoll, J.*—This is a case that has been referred to me for disposal under section 429 of the Code of Criminal Procedure. It is unnecessary to set out the proved facts again as they have already been set out by the learned Chief Judge. Both my learned colleagues have come to the finding that Maung Kyaw We caused the injuries he is alleged to have caused, and after perusing and considering the evidence I have come to the same conclusion. Maung Kyaw We for no proved reason approached Maung Myat Pu treacherously from behind and with a *dama* of the following description—22½ inches long, the handle being 10½ inches long and the blade 12 inches long, breadth of blade 2 inches, weight 70 tolas—aimed at and cut Maung Myat Pu on the neck and shoulder. The wound on the neck was on the left side and was 4 inches long by ¾ inch broad by 1½ inches deep and it reached to near the spine. That on the shoulder was on the right shoulder blade and was 2 inches long by ¾ inch broad by ½ inch deep, slicing the shoulder blade bone and in a slanting position. There was a third slight injury on the neck which would appear to have been inflicted by the same blow as caused the second injury. Maung Kyaw We has been convicted under section 307 of the Indian Penal Code, which runs as follows.—“Whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder, shall be punished, etc.” The acts of Maung Kyaw We were to aim at and cut Maung Myat Pu with the deadly weapon described and in the manner described. From these acts must be deduced his intention. If his intention was to cause death or bodily injury, the bodily injury intended to be inflicted being sufficient in the ordinary course of nature to cause death, then in my opinion he has been rightly convicted. Every man must be assumed to intend the natural or necessary consequences of his own act. What is there in this case to deduce Maung Kyaw We's intention from? There is the size of the weapon he wielded and its nature. There is the approaching from behind. There is the cutting on the neck, a very vital part of the body, and on the vicinity of the neck. There is also the nature of the injuries inflicted. Intention cannot in my opinion be correctly inferred merely from a consideration on the injuries inflicted—the results of the act—though in many cases the nature of the injuries forms a valuable piece of evidence in deducing

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it; but it must also be deduced from a consideration of the whole facts of the case. Here the question resolves itself into this: What intention should be imputed to Maung Kyaw We approaching Maung Myat Pu stealthily from behind and cutting him on the neck so as to inflict the very serious injury described, and then following the first blow up with another in a slanting direction on the shoulder blade and neck? It should be noted that he was then seized and, in spite of his struggles, restrained from causing further injury. In my opinion he could have had no less an intention than of causing the death of Maung Myat Pu. I am therefore of opinion that he has been rightly convicted. The sentence is not in my opinion excessive, and I dismiss the appeal.

*Criminal  
Revision  
No. 237 B of  
1908.*

*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.*

KING-EMPEROR v. PAW YAN.

*August 6th,  
1908.*

*Possession of opium not purchased from Government—Illegal possession of opium  
—Pr. supmption from evidence—Opium Act, ss. 9 (c), 10.*

The accused was found in possession of three tolas of opium five days after his last purchase of that amount recorded on his consumption slip. The Magistrate presumed that he must have consumed half a tola a day, and that therefore the three tolas in his possession could not be opium purchased from Government. The defence was that accused had consumed only opium borrowed from friends in the meanwhile.

*Held*,—that the Magistrate's presumption was not justified.

The following reference was made by the District Magistrate of Henzada, under section 438 of the Code of Criminal Procedure:—

I forward this case to the Chief Court as I think that accused has been convicted on insufficient evidence. He was found in possession of only three tolas of opium on the 9th June and it was proved from his consumption slip that he had purchased three tolas on the 4th June. It was presumed that he must have consumed  $\frac{1}{2}$  tola a day and he could not therefore have been in possession of three tolas which he had purchased from Government.

His defence was that he had borrowed opium from his friends, so that he had not consumed the opium which he had bought from the shop on the 4th June. I hold that the presumption under section 10 of the Act does not apply to a case of this kind. Rule 14 (page 19, Opium Manual) lays down that a non-Burman can possess 3 tolas of Government opium which he has bought from Government or a licensed vendor. The accused stated that he had bought the opium from a Government shop, and the contrary could not be proved by the prosecution. It seems to me therefore that he should not have been convicted. As there have been other prosecutions of this kind, I ask for a ruling.

The following order was passed by—

*Irwin, Offg. C.J.*—I agree with the District Magistrate that the Additional Magistrate was not justified in drawing the inference which he drew from the proved facts. I set aside the conviction and sentence and acquit Paw Yan and direct the fine be refunded.

## Full Bench—(Criminal Revision.)

Before Mr. Justice Irwin, C.S.I., Officialing Chief Judge,  
Mr. Justice Hartnoll, and Mr. Justice Ormond.

Criminal  
Revision  
No. 91B of  
1908.  
August 10th,  
1908.

## KING-EMPEROR v. THA BYAW.

*Cheating—'Fraudulently' Meaning of—Purchase of opium by personation—Indian Penal Code, s. 415—Duty of High Court in revision—Illegal joinder of charges—Misjoinder—Criminal Procedure Code, ss. 233, 234, 439.*

The accused, by giving a false name and address, succeeded in purchasing at a Government opium shop a certain quantity of opium which would not have been sold to him if he had not practised this deceit.

*Held* (Irwin, C.J., dissenting).—that he committed the offence of cheating as defined in section 415 of the Indian Penal Code.

Meaning of the word "fraudulently" discussed.

The accused was tried at one trial for committing eleven different offences of the same kind.

*Held*,—that although the joinder of charges was illegal and the conviction therefore bad, the High Court was not bound to interfere in revision as the accused did not appear to have been prejudiced by the misjoinder, but had pleaded guilty and had made no application for revision.

*Queen-Empress v. Abbas Ali*, (1896) I.L.R. 25 Cal., 512; P.J., L.B., 437; *Kedar Nath Chatterjee v. King-Emperor*, 5 C.W.N., 897; *Queen-Empress v. Muhammad Saeed Khan*, (1898) I.L.R. 21 All., 113; *Queen-Empress v. Soshi Bhushan*, (1893) I.L.R. 15 All., 210; *Crown v. Po Lu*, 1 L.B.R., 357; *Kolamraju Venkatroyadu*, 1 Weir's Criminal Rulings, 538a, 4th edition; *Regina v. Toshack*, 4 Cox, Cr. C., 38; *Queen-Empress v. Vithal Narayan*, I.L.R. 13 Bo n., 515, Note; *Subrahmanya Ayyar v. King-Emperor*, (1901) I.L.R. 25 Mad., 61; referred to.

*King-Emperor v. Yena*, 4 L.B.R., 49; *Ala Dya v. King-Emperor*, 41 Punjab Record Crl. Jts., 11; followed.

*Irwin, Offg. C.J.*—Tan Sein, a Chinaman, pleaded guilty to the following charge :—"That you, in July and August 1907, at Henzada cheated in the following manner. You are resident of Daunggyi and obtained from Zalun shop in July and August 1907 in the name of Htan Sein, son of Win Yom, supply of opium according to the allowance fixed for you. During the same months you went to Henzada shop and bought 33 tolas of opium in the name of Tha Byaw, son of Sit Ni, resident of Shwegu quarter. Thus you obtained more opium than you are allowed to consume; and thereby committed an offence punishable under section 417 of the Indian Penal Code."

The Sessions Judge has sent up the record for orders, on two grounds. He thinks the accused's acts were not fraudulent (and if so, no offence was committed; and there were several transactions, considerably more than three, and their joinder in one charge was illegal.

The expressions in the charge "the allowance fixed for you" and "more opium than you are allowed to consume" require explanation. The District Magistrate was asked about this, and he refers to Opium Direction 71 and the policy of the Local Government, not to any law or rule having the force of law.

Under rule 14 (ii) any non-Burman may possess opium not exceeding three tolas in weight which he has bought from Government or from a licensed vendor. There is no law limiting his daily or monthly consumption.

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One of the conditions of a license for retail vend of opium (Form VIII) is that the licensee shall not sell without the permission of the Resident Excise Officer to one person in one day more than three tolas of opium. It is clear then that the vendor is not legally bound to supply every comer with as much opium as he chooses to buy; on the contrary the maximum amount he may sell is strictly limited, and he is under the orders of the Resident Excise Officer.

Under rule 68, which has the force of law, every retail vendor is required to keep a daily account of sales of opium in a form in which there is a place for the name of the purchaser, whether Burman or non-Burman, and the amount daily sold to each person.

Direction 71, which has not the force of law, lays down that it is the duty of the Resident Excise Officer to prevent sales of opium to any purchaser in excess of his probable consumption or means of purchase.

Now, to determine whether the offence of cheating was committed by Tan Sein, we have to look to the words of section 415: "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person." There is no doubt that the Resident Excise Officer at Henzada was deceived by Tan Sein giving a false name and representing himself to be a resident of Henzada town. And having regard to rule 68 and direction 71 it is obvious that if Tan Sein had given his true name and address, the Resident Excise Officer would have refused to let him buy any opium. In consequence of the deception he supplied him with opium.

The deception was not dishonest, as it would not cause wrongful loss to anybody, nor would it cause wrongful gain to Tan Sein. He is legally entitled to possess as much opium as he can induce the Resident Excise Officer to permit him to buy, so long as he does not possess more than three tolas at one time.

It remains to be considered whether the deception practised by Tan Sein was fraudulent.

In *Queen-Empress v. Abbas Ali* (1), five Judges of the Calcutta High Court held that the word "fraudulently" is used in the Penal Code in a sense not covered by "dishonestly," and is not confined to transactions of which deprivation of property forms a part; but they did not define the necessary elements of a fraudulent act.

In *Kedar Nath Chatterjee v. King-Emperor* (2), the accused had produced in a Civil Court a forged bond which was a *fac-simile* of a genuine bond. It was not proved that the genuine bond had been discharged; therefore the accused's act was not dishonest, but it was nevertheless held to be fraudulent, and the conviction under section 471 was upheld. This does not afford much help in the present case.

(1). (1896) L.R. 25 Cal., 512; P.J., L.B., 437. (2) 5 C.W.N., 897.

In *Queen-Empress v. Muhammed Saeed Khan* (3), the learned Judge quoted some observations of Sir James Stephen in his History of the Criminal Law of England, viz.—

Whenever the words "fraud" or "intent to defraud" or "fraudulently" occur in the definition of a crime, two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive, or in some cases mere secrecy; and secondly, either actual injury or possible injury, or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage \* \* \* A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this—Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk to some one else, and if so, there was fraud.

If the "practically conclusive test" just described were applied to the present case, without regarding the rest of the passage, Tan Sein's act would at once be pronounced fraudulent, for Tan Sein obtained by deceit a quantity of opium which he would not have obtained without deceit. But if we look for the "actual injury or risk of possible injury" to some other person, or the "equivalent in loss or risk of loss to some one else," what do we find? The object of Government in framing the rules and directions under the Opium Act is to restrict the consumption of opium in order to prevent persons who are deficient in self-control from injuring themselves physically and morally by over-indulgence in the drug. It may be taken that the deception practised by Tan Sein tends in some small degree to defeat that object, but it appears to me that the risk of injury to some persons unknown involved in the success of the deception is too remote and too meagre to be taken as fulfilling the condition suggested by the eminent jurist.

Moreover, causing risk of injury to some persons unknown who have nothing to do with the person deceived does not seem to fulfil the condition laid down in section 25, Penal Code.

In *Queen-Empress v. Soshi Bhushan* (4), it was said that a forged certificate by which a person gained admission to a law class was fraudulently made because he thereby obtained an advantage, or a privilege, which without such deception could not have been obtained; but the advantage was also held to be wrongful gain, and the act was not only fraudulent but also dishonest.

In *Crown v. Po Lu* (5), a late Chief Judge of this Court, without discussing the exact meaning of the word "fraudulently," held that a Burman who went to an opium shop with another Burman's ticket and by personating that other obtained opium was guilty of cheating. The distinction between that case and the present one is that a Burman could not obtain any opium from the shop without being registered (the ticket is the certificate of registration) and that not being

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(3) (1898) I.L.R. 21 All., 113. | (4) (1893) I.L.R. 15 All., 210.  
(5) 1 L.B.R., 357.

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registered he was not legally entitled to possess any opium. It does not appear that the case was argued.

Without expressing any opinion whether the last-mentioned ruling is correct or not, I think Sir James Stephen's view is correct, and there was no fraud in the present case. I would set aside the conviction and sentence, and direct that the fine be refunded.

As my learned colleagues find that cheating has been committed there remains the question of misjoinder of charges. I think the trial was bad for misjoinder, but I agree that we are not bound to set aside the conviction for that reason in revision, and that there is no reason why we should set it aside, the accused having pleaded guilty.

*Hartnoll, J.*—As the facts have been already set out by the learned Chief Judge it is unnecessary for me to set them out again. It is clear that Tan Sein *alias* Maung Tha Byaw by deceitful means obtained more opium than he would otherwise have done, and the question is whether his conduct has been fraudulent. The meaning of the word "fraudulently" was very carefully discussed in the case of *Kotamraju Venkatroyadu* (6), and in his judgment in that case the learned Chief Justice refers to the observations of Sir James Stephen on the meaning of "fraud" or "intent to defraud" or "fraudulently." Sir James Stephen stated that whenever the words "fraud" or "intent to defraud" or "fraudulently" occur in the definition of a crime, two elements at least are essential to the commission of the crime; namely, first, deceit, or an intention to deceive, or in some cases mere secrecy; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. The meaning of the word "defraud" as used in section 25 of the Penal Code was also discussed in the case above quoted and also in the case of *Queen-Empress v. Abbas Ali* (1), in which it was held that the word "defraud" was of double meaning in the sense that it either may or may not imply deprivation. In the same case the learned Judges, in comparing the word "fraudulently" with the word "dishonestly," expressed the view that the word "fraudulently" should not be confined to transactions of which deprivation of property forms a part. The case of *Regina v. Toshack* (7) was also referred to by them, and this was a case clearly where there was no deprivation of property. Benson, J., in the case first mentioned by me further refers to illustration (k) to section 464 of the Indian Penal Code, which makes it a fraudulent act for one man without the authority of another man to write a letter and sign it in that other's name, certifying to his character and with the intention thereby of obtaining employment under a third person. There is clearly in this instance no deprivation of property. In the case of *Queen-Empress v. Vithal Narayan* (8), the learned Judges, in discussing the illustration quoted above, mention with approval apparently a ruling of LeBlanc, J., that "by fraud is meant an intention to deceive; whether it be from

(6) 1 Weir's Criminal Rulings,  
53a, 4th edn.

(7) 4 Cox, Cr. C., 38.

(8) I.L.R. 13 Bom., 515, Note.

any expectation of advantage to the party himself or from the ill-will towards the other is immaterial." It certainly seems to me that the word "defraud" does not necessarily mean deprivation of property and that this is clear from illustration (k) and section 464. It is unnecessary to discuss whether the ruling of LeBlanc, J., should be followed in deciding what constitutes fraud punishable by the penal law, as for the purposes of the present case I am of opinion that it is sufficient to adopt the definition of Sir James Stephen and that it may be taken that, if both the elements mentioned by that learned jurist are present in the case under discussion, there is no doubt that there has been fraudulent conduct within the meaning of section 415 of Indian Penal Code. It seems to me that in the case alleged against Tha Byaw *alias* Tan Sein both these elements are present. A perusal of directions 71 and 71A in the Burma Opium Manual, 1904, shows that Government desires to limit the supply of opium to a consumer not only to prevent excessive consumption by himself but to prevent his disposing of the drug to those forbidden by law to consume it. A perusal of rules 14, 26 and 28 show that as regards Burmans only a limited number of them can legally possess opium. Only those who have been registered some time in the past can now possess the drug unless the proviso to rule 28 can be pleaded, and there must be very few of such cases. These rules have obviously been framed to prevent the consumption of opium generally by the Burmans, as it is considered deleterious to them; and when Government prohibits the consumption of a drug in such a manner, I think that the Courts must consider that to supply to those prohibited from consuming it must cause actual injury to them or at least possible injury or risk of possible injury to them. Where therefore a man by deceit gets possession of more opium than he would otherwise be able to get hold of, there is always the danger—not remote in my opinion, but immediate and present—of his hawking it about to those prohibited from using it. This so disposing of the drug must happen constantly in Burma from the ordinary course of human nature, and it is a matter of common knowledge that it does. I consider that the injury, or possible injury, to the Burman nation from the unlawful hawking of opium is far greater and immediate than the possible injury from the harm caused to the public at large by unauthorized persons fabricating certificates so as to enable them to sit at examinations which the recent course of judicial decision in India has held to be fraudulent. I must therefore hold that on the facts proved against Maung Tha Byaw *alias* Tan Sein, his conduct is fraudulent within the meaning of section 415 of the Indian Penal Code.

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The next question arises as to whether trial is invalidated by misjoinder in that eleven different transactions have been lumped together in one charge. Misjoinder there has been unquestionably, and under the ruling of their Lordships of the Privy Council in the case of *Subrahmaia Ayyar v. King-Emperor* (9), section 537 of the Code of Criminal Procedure cannot be applied to cure the illegality. But in this case Maung Tha Byaw has not personally applied for revision, and



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the powers of this Court are discretionary under section 439 of the Code. In the cases of *King Emperor v. Yena* (10) and *Ala Day v. King-Emperor* (11), this Court and the Punjab Chief Court refused to interfere in the exercise of their discretion. In the present case no injustice seems to have resulted. Maung Tha Byaw pleaded guilty and clearly quite understood what he was pleading to. In my opinion a wise discretion would be exercised by not interfering. I would not interfere with the conviction and would return the record.

*Ormond, J.*—The accused by means of deceit obtained opium which he would not otherwise have obtained, *i.e.*, he obtained goods by false pretends. He acted "dishonestly" within the meaning of the Penal Code, sections 24, 23, because by means of deceit he gained opium which was not his own, and which he would not have gained but for the deceit.

It matters not, I think that he paid the usual price. If, having given his true name and address, he would have been entitled to this opium at double the price that would have been charged him if he had resided at another place he would clearly be guilty of cheating, if he obtained at the lower price by a false representation as to his residence; so, too, if he obtains it (as in this case) by means of a false representation, when he would not have been able to obtain it at any price without such deceit.

In my opinion the accused is guilty of cheating under section 417 of the Indian Penal Code.

I do not think the conviction should be set aside because of the joinder of eleven charges, for the reasons stated by Mr. Justice Hartnoll.

### Full Bench—(Civil Reference.)

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge,  
Mr. Justice Hartnoll, and Mr. Justice Ormond.

*In re* THE NETHERLANDS TRADING SOCIETY.\*

*Young*—Government Advocate. | *Higinbotham*—for opposing parties.

*Bill of exchange*—Stamp duty on second of exchange—Indian Stamp Act, 1899, ss. 2 (2) (3), 67, Schedule I, article 13.

A second of exchange payable on demand does not require to be stamped when the first of exchange has been stamped with a stamp of one anna.

The following reference was made by the Financial Commissioner, Burma, under section 57, sub-section (1), of the Indian Stamp Act:—

This is a reference from the Collector of Rangoon under section 56 of the Indian Stamp Act, 1899, in which he asks for the decision of the Financial Commissioner upon the liability to stamp duty of the second parts of bills of exchange payable on demand. It came to the notice

(10) 4 L.B.R., 49.

(11) 41 Punjab Record, Crl. Jts., 11.

\* In the matter of a reference made by the Financial Commissioner, Burma, under section 57, sub-section (1), of the Indian Stamp Act, 1899, as amended by the Lower Burma Courts Act, 1900, Schedule I.

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of the Collector that the Netherlands Trading Society was in the habit of drawing its bills of exchange in two parts and stamping the first part only with a stamp of one anna. The second part was issued without a stamp, and the practice of the bank was to impress on the second part with a rubber stamp a statement to the effect that the first of exchange had been duly stamped.

2. The Netherlands Trading Society was called on by the Collector to show cause against a prosecution. They stated that the practice of stamping only the first part of bills of the exchange was adopted some years back under legal advice to the effect that it was in accordance with the law, and that they were not aware that any exception could be taken to it. They proceeded to argue that the second of exchange was not liable to stamp duty. They point out that article 13 of Schedule I of the Stamp Act deals with three classes of bills of exchange, namely:—

(1) Those payable on demand;

(2) Those payable otherwise than on demand but not more than one year after date, and

(3) Those payable more than one year after date.

They point out that the schedule provides for stamping each part of a set in the second class of such bills, but that in the first and third classes no obligation to stamp each part is imposed by the schedule, and they contend that the single duty of one anna for the first class and a single payment of the duty payable on a bond for the third class are sufficient. They also point out that according to section 132 of the Negotiable Instruments Act, the several parts of a bill of exchange constitute only one bill. With reference to section 67 of the Stamp Act they contend that it is applicable only to cases where the Legislature has made special provision for the separate stamping of separate parts of bills. The Trading Society ask that the matter may be adjudicated by the Chief Court, and they submit a bill for adjudication under section 31 of the Stamp Act.

3. The Collector of Rangoon reports that according to his information the practice of other banks in Rangoon is to stamp both parts of bills of exchange payable on demand. No previous adjudication by a High Court or Chief Controlling Revenue Authority upon this question has been traced.

4. According to clause (2) of section 2 of the Stamp Act a "bill of exchange" is defined for the purposes of the Stamp Act in the same terms as by the Negotiable Instrument Act, 1881. Now section 132 of the Negotiable Instruments Act, 1881, does not form part of the definition of a bill of exchange in the latter Act, and I am unable to see that its provisions can be imported into the Stamp Act by virtue of clause (2) of section 2 of the Stamp Act. It is reasonable that the several parts of a bill of exchange should form one transaction, just as it is reasonable that several documents which together constitute a mortgage should be regarded by the Courts of law as one transaction, although each of the documents which together constitute a mortgage may be dutiable under other articles of the schedule of the Stamp Act

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besides those which deal with mortgages. It appears to me that both the first and the second of exchange in the document submitted by the Netherlands Trading Society are within the definition contained in clause (3) of section 2 of the Stamp Act for bills of exchange payable on demand. It must then be remembered that according to section 3 of the Stamp Act duty is chargeable not upon transactions but upon instruments, and that where the Legislature desired to make an exception and to charge the duty upon transactions as in section 4 of the Stamp Act, special arrangements were made for that purpose. It therefore appears to me that both the first and the second of exchange come within the terms of article 13, clause (a), of Schedule I of the Stamp Act; that each is a chargeable with a duty of one anna and that there is no exemption for the second of exchange on account of the first of exchange being stamped. It appears that, according to section 39 of the Statute, 54 and 55 Vict., when a bill of exchange is drawn in a set and one of the set is duly stamped, the other or others of the set are exempted from duty, and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set, which has not been issued or in any manner negotiated apart from the lost or destroyed bill, may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill. If it had been the intention of the Indian Legislature to introduce this provision into India it appears to the Financial Commissioner that plain words for this purpose would have been used. The matter, however, appears to be one which, according to the request of the Netherlands Trading Society, may properly be referred for the decision of the Chief Court of Lower Burma. The decision of the said Court is therefore solicited upon the question whether a second of exchange payable on demand requires to be stamped with a stamp of one anna when the first of exchange has been stamped with a stamp of one anna.

*The opinion of the Bench was as follows:—*

*Irwin, Offg. C. J.*—The question referred by the Financial Commissioner is whether a second of exchange payable on demand requires to be stamped with a stamp of one anna when the first of exchange has been stamped with a stamp of one anna.

In expressing an opinion that the question should be answered in the affirmative, the Financial Commissioner assumed that the first and the second of exchange are not one instrument, but two. If they form only one instrument it is plain, I think, that only one stamp can be required.

The learned Government Advocate's argument is this. In the Stamp Act of 1879 "bill of exchange" was not defined: the definition in the Negotiable Instruments Act applied. A bill of exchange was essentially an instrument containing an unconditional order to pay. The words "first unpaid" constitute a condition, and therefore the second of exchange was not within the definition. But in the Act of 1899 there is not only a definition of "bill of exchange" but a further definition of "bill of exchange payable on demand," which includes an order for the payment of money upon any condition which may or

may not be performed. This new definition covers the second of exchange, which therefore is chargeable with duty.

If this argument be sound, it applies equally to the first of exchange, which contains the words "second unpaid," and thus neither first nor second was chargeable with duty as a bill of exchange under the Act of 1879. I think this is sufficient to dispose of the argument. The truth seems to me that neither "second unpaid" nor "first unpaid" is a condition within the meaning of section 2 (3) (a) of the present Stamp Act, and the reason why they are not conditions is that the two parts form one and only one bill.

Article 13 of Schedule I prescribes the stamp duty payable on a bill of exchange. Bills payable on demand are chargeable with a duty of one anna only, however great the amount of the bill. Bills payable not more than one year after date or sight are assessed to a substantial amount of duty on an *ad valorem* scale. Bills payable at more than one year are assessed at a very much higher rate *ad valorem*. Provision for bills drawn in sets of two or three is made only in the case of bills payable not more than one year after sight. In the case of the first and third classes no mention is made of any stamps on a second or third of exchange in case they are drawn in sets. It is very significant that the next article (14) contains a note that if a bill of lading is drawn in parts the proper stamps must be borne by each part. The absence of any such note in article 13 indicates that a stamp is required on only one part.

Section 67 imposes a penalty on any person who draws or executes a bill of exchange or policy on marine insurance purporting to be drawn or executed in a set of two or more without at the same time drawing or executing on paper duly stamped the whole number of bills or policies of which such bill or policy purports the set to consist. "Duly stamped" is defined as bearing a stamp of not less than the proper amount. In the case of a document not chargeable with duty this expression is not applicable at all. The reference to sea insurances might at first sight seem to be strongly in favour of the Government, because in the schedule as enacted in 1899 there was no provision for stamping sea insurances in sets, while section 67 plainly implies that each part of the set is chargeable with duty. But sets of insurance policies seem to differ radically from sets of bills of exchange. In the schedule as amended by Act V of 1906 the heading of the last column is "If drawn in duplicate, for each part."

It would seem that before the amendment the second part of a set of policies was chargeable under article 25 as a duplicate, and the amendment was made to lighten the duty so chargeable. It is not suggested that the second of a bill of exchange is chargeable as a duplicate or counterpart.

I would answer the question referred in the negative.

*Hartnoll, J.*—There seems to be no doubt that according to English mercantile usage a bill of exchange may be drawn in sets and that the whole set constitutes only one bill, and as authority for this statement I would invite a reference to page 137, 16th edition of the

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learned work "Byles on Bills." The Indian Stamp Act of 1899 also contemplates that a bill of exchange, though drawn in sets only, constitutes one bill, as article 13 of the first schedule does not refer to each part of a set as a separate bill but merely refers to a bill of exchange drawn singly or in sets. The first portion of the definition of a bill of exchange in section 2 (2) of the Indian Stamp Act, 1899, seems to me to refer to a bill of exchange as drawn according to English mercantile usage. Section 2 (3) of the same Act on the other hand, I am of opinion, is meant to refer to other instruments and to include them within the head of a bill of exchange payable on demand. I therefore hold that the instrument, the subject of this reference, is only one bill and not two for the purposes of the Indian Stamp Act, 1899, and so therefore that it is only one instrument. As it is payable on demand I consider that it is only chargeable with a duty of one anna under article 13 (a) of the first schedule.

*Ormond, J.*—A bill of exchange drawn in parts is but one bill of exchange under sub-section (2) of section 2 of the Stamp Act. Each part therefore cannot be held to be a bill of exchange under sub-section (3) of that same section, in the absence of express words to that effect.

I concur in answering the question referred in the negative.

### Full Bench (Civil Reference.)

*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge,  
Mr. Justice Hartnoll, and Mr. Justice Ormond.*

*In re V. R. S. A. R. RAMAN CHETTY.*

*Young—Government Advocate.*

*Civil  
Reference  
No. 3 of  
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*Instrument—Promissory note—Memorandum of agreement—Letter containing statement of entry of receipt in accounts and of rate of interest payable with promise to pay—Indian Stamp Act, 1899, s. 2 (14), Schedule I article, 5 (b).*

A letter was addressed by A to B, in which A stated that he had entered a certain sum as a credit in his accounts as from a certain date, for a specified period and at a specified rate of interest; and also promised to pay the principal and interest on the due date.

*Held* (Ormond, J., dissenting),—that the letter was an instrument as defined in section 2 of the Stamp Act, and was chargeable as a memorandum of agreement under article 5, Schedule I, of the Act.

*Rainier v. Goguld*, (1889) I.L.R. 13 Mad., 255; *Mortgage Insurance Corporation, Ltd. v. Commissioners of Inland Revenue*, (1899) L.R. 21 Q.B.D., 352; *Carlill v. Carbolic Smoke Ball Co.*, (1892) L.R. 2 Q.B.D. 484; referred to.

The following reference was made by the Financial Commissioner, Burma, under section 57, sub-section (1), of the Indian Stamp Act, 1899.

\* In the matter of a reference made by the Financial Commissioner, Burma, under section 57, sub-section (1), of the Indian Stamp Act, 1899, as amended by the Lower Burma Courts Act, 1900,

Under the provisions of section 57, sub-section (I), of the Indian Stamp Act, 1899, I refer the case stated below to the Chief Court of Lower Burma.

The document at page 4 of the proceeding above quoted was impounded by the Chief Court as being chargeable under article 1 of Schedule I of the Indian Stamp Act, 1899, as an acknowledgment. The document was produced before the Chief Court in Civil Regular Suit No. 338 of 1907. A somewhat similar document was produced before the Chief Court in another civil case and was also held to be an acknowledgment. The Officiating Financial Commissioner, differing from the view, held that the document was an agreement chargeable with a duty of 8 annas under article 5, clause (b), of Schedule I of the Stamp Act, and he made a reference to the Chief Court on the 22nd of March 1908. That reference has not yet been decided. It therefore appears to me to be convenient to refer this case also to the Chief Court.

The Chetty community every two months fix a rate of interest for loans between themselves, and money is then lent from one Chetty firm to another at such premium above, or discount below, the rate of interest fixed for the period of two months as the two firms may mutually agree upon. In the case now in question the firm of V.R.S. A.R. borrowed Rs. 3,000 from the firm of M.S.A.P.L. and agreed to pay interest at a premium of Re. 0-1-9 above the fixed rate after the expiry of four months. From the letter and from the statement of Raman Chetty of the firm of V.R.S.A.R. it appears that there had been previous transactions between the parties, and from the statement it seems that Rs. 5,000 had been borrowed by Raman from Allagappa, and the Raman had paid back Rs. 2,000. He therefore retained Rs. 3,000 and renewed for four months the loan for Rs. 3,000. The statement of Raman Chetty to the Collector makes it doubtful whether the letter ought to be regarded as a promise to repay on a certain date money already received, or merely as a proposal to borrow Rs. 3,000 on certain terms. But if the document is looked at by itself, and I conceive this to be the proper way of dealing with it since the Stamp Act levies duties upon instruments and not upon transactions, then the document must, in my opinion, be construed as an acknowledgment of the receipt of Rs. 3,000 and a promise to pay it back at a rate of interest and on a date which, though not specified, are ascertainable. The case referred to the Chief Court by the Officiating Financial Commissioner related to an entry in an account, but it was signed by the borrower. It contained no reference to previous transactions nor did it contain a promise to repay in definite words, though the signature of the borrower was presumably intended to bind him to repayment. In that case the Officiating Financial Commissioner held that the mention of interest took the entry in the account book out of article 1 of Schedule I of the Stamp Act, and in the present case there is not only mention of interest but a promise to repay, and I consider that this present document must be regarded as something more than an acknowledgment. In the former case the

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Officiating Financial Commissioner held the instrument to be an agreement, but I have some difficulty in coming to the same opinion about the present document. Under the Stamp Act of 1879 it was held by the Madras High Court, *Rainier v. Gould* (1), that a series of letters relating to an agreement to purchase 50 shares in a company were admissible in evidence without being stamped, as they did not constitute an agreement within the intention of the Stamp Act. The judgment of the High Court of Madras proceeded to a considerable extent upon a comparison of the Stamp Act of 1879 with that of 1869 and that of 1862. In the Stamp Act of 1899 a provision relating to the stamping of one of a series of letters has been reintroduced as clause (c) of section 35, and Mr. Donough at page 159 of the book upon the Indian Stamp Law considers that this clause disposes of the ruling in the Madras case above cited. I am not clear that such is its effect. In the first place, by section 3 of the Stamp Act, 1899, duty is chargeable upon instruments, and by section 2, clause (14), an instrument is defined to include every document by which any right is created. The term "agreement" is not defined in the Stamp Act, but according to general legal principles an agreement is the expression by two or more persons of a common intention to effect their legal relations. In the case of an agreement reached by correspondence, it seems clear that in no one document is there any such expression by two persons of a common intention. Even if the simple case is taken where one party makes proposals and the other says he agrees to the proposals contained in a letter of such and such a date, it is still not clear that a legal contract has been arrived at, for the provisions relating to revocation which are contained in Chapter I of the Contract Act, 1872, must be considered. Although under the General Clauses Act, 1897, words used in the singular are generally to be interpreted as applying also to the same words used in the plural, there seems to be a difficulty in holding that the word "document" in the definition of "instrument" in section 2, clause (14), of the Stamp Act is to be applied as including a set of documents. If such were the case the provisions contained in section 4 of the Stamp Act should have been differently expressed. Moreover, there are practical difficulties in applying the theory that one out of several letters constituting together an agreement, should be stamped. Mr. Donough, in his book already mentioned, notices this difficulty and recognizes that section 17, of the Stamp Act cannot be complied with in such a case. He thinks that as no time is specified the stamp may be affixed at any time before the document is produced in Court, and he refers to rule 9, sub-rule (2), of the rules made by the Government of India under section 10 of the Stamp Act, and last published in the Finance and Commerce Department Notification No. 3632-Exc., dated the 29th June 1906. That sub-rule provides that impressed labels may be affixed and impressed in the case of agreements which are written in a European language and which are such that in the opinion of the Superintendent of Stamps they cannot conveniently be written on

(1) I.L.R. 13 Mad., 255.



sheets of paper on which the stamps are engraved or embossed. It may be observed that this rule applies only to documents in European languages and therefore would not apply to documents executed in the Tamil language. Moreover, rule 10 of the same rules provides that labels can be impressed only upon instruments which are brought to the Superintendent of Stamps before execution. According to rule 5 of the abovementioned rules an agreement ought to be written upon paper upon which the stamp has been engraved. It appears to me the an agreement reached by correspondence could not be stamped except under section 41 of the Stamp Act, or under section 37 read with rule 16. In the latter case the person writing the letter would have to put on an adhesive stamp of 8 annas and then trust to the Collector to believe that an improper description of stamp was used because of the inconvenience of using one of the proper description. There are a number of English cases regarding the stamping of agreements reached by correspondence, but in England the duty upon agreements may be denoted by adhesive stamps, and the law in England is not the same as section 17 of the Indian Stamp Act, 1899, with regard to the time of stamping. Having regard to these difficulties I doubt whether this document executed in the Tamil language can be held to be an agreement.

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*In re*V. R. S. A.  
RAMAN  
CHETTY.

I am not clear, however, that this document is not a promissory note. A promissory note is defined by section 2, clause (22), of the Stamp Act, 1899, to be an instrument in writing containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to a certain person, and the sum payable may be certain within the meaning of the definition, although it includes future interest or is payable at an indicated rate of exchange. In the present case the document promises to pay a certain sum of money to a certain person and it includes future interest. The rate of future interest is, however, not definitely specified and depends upon the decision of the Chetty community with regard to the rate of interest for the two-monthly period. I have not been able to find any case reported which is directly in point, but it appears to me that the certain sum of money referred to in the definition may be meant to be a sum of money ascertainable by ordinary arithmetical calculation according to a rate which is published apart from the agreement of the parties. It may be observed that section 23 of the Stamp Act, 1899, prevents any difficulty from arising in assessing the duty owing to the mention of a rate of interest which is not on the face of the document a fixed amount. I am therefore disposed to hold that the document in this case is a promissory note payable otherwise than on demand but not more than one year after date, and is chargeable with duty of Rs. 3 under article 49 of Schedule I of the Stamp Act.

*The opinion of the Bench was as follows :—*

Ormond, J.—The question referred is whether the document quoted below, and which has been stamped as an acknowledgment, is

August 10th,  
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*In re*  
R.S.A.R.  
RAMAN  
CHETTY.

an agreement or memorandum of agreement, or a promissory note, for the purposes of the Stamp Act. The document is as follows :—

(Translation.)

(Seal)

V. R. S. A. R.  
Myaungmya.

RANGOON.  
M. S. A. P. L.

12th Aunani, Parabhava year (corresponding to 27th August 1906).

Raman Chetty writes (as follows) :—

Now, you will know the news of this place on this letter reaching you. Please write (to us) of the news there.

Now, we have shown as a credit, as on the 11th of Auni last (corresponding to 24th June 1906), from *tavanai* (i.e., term-loan) account, Rs. 3,000, this (sum of) rupees three thousand (only) for 2 *tavanai* (—s) (i.e., terms of two months each) at a premium of Re. 0-1-9. We will send the principal and interest as per the due date. Please send the former signed letter.

Other particulars afterwards. Yours,

Under (the deity) Malaiyilingam's protection,  
V. R. S. A. R. RAMAN CHETTY.

On the face of it, the document is a letter acknowledging the receipt of Rs. 3,000 as having been borrowed two months before for four months at a premium of 1 anna 9 pies. It states that the loan has been duly entered in the writer's books and that it will be duly repaid with interest on the due date. The sentence, "Please send the former signed letter," would imply that a previous written acknowledgment in respect of this debt had been given, and that as the present acknowledgment is given, the writer asks for its return.

It is not a promissory note, I think, for the following reasons :—

*First.*—It is not a document the contents of which consist substantially of a promise to pay and of nothing else. The purpose and substance of the document is, I think, to acknowledge the debt of Rs. 3,000. The definition of a promissory note in the Indian Stamp Act has been taken from the English Stamp Act; and I would refer to the judgment in *Mortgage Insurance Corporation, Limited v. Commissioners of Inland Revenue* (2).

*Secondly.*—There is no promise to pay to, or to the order of, a certain person or to the bearer of the instrument. There are certain letters of the alphabet in the right-hand top corner, which probably denote a Chetty firm; but there is nothing in the document to show that it is addressed to them, or that the money would be paid to them.

In determining whether the document is an agreement or memorandum of agreement, the surrounding circumstances stated by the Financial Commissioner must be taken into consideration. These, I think, show that the document is an offer to renew in part a former loan upon certain terms. It does not appear in what manner the offer was accepted. If accepted in writing, the offer and acceptance together amount to an agreement; but if accepted by parol, such acceptance would not convert the offer into an agreement nor into a memorandum of the agreement, unless after the acceptance something

is said or done by the parties to indicate that the document is to be so considered—*Carlill v. Carbolic Smoke Ball Co.* (3).

There is sufficient indication in the document itself to show that if the offer is accepted and the former signed letter returned, the present document should be retained by the creditor as evidence of the transaction, but not otherwise. And as the document contains a promise, it would then amount to a memorandum of agreement and not merely to an acknowledgment.

In my opinion, the document is not a promissory note.

And as there is nothing to show that, after the offer contained in the letter was accepted, anything was said or done by the parties to indicate that the document was to be retained as evidence of the transaction, the document in my opinion is not an "instrument" within the meaning of the Stamp Act, and is therefore not liable to be stamped.

*Hartnoll, J.*—The document sent for our decision is to the following effect :—

(Translation.)

(Seal)  
V. R. S. A. R.  
Myaungmya.

RANGOON.  
M. S. A. P. L.

12th Aunani, Parabhava year (corresponding to 27th August 1906).

Raman Chetty writes (as follows) :—

Now, you will know the news of this place on this letter reaching you. Please write (to us) of the news there.

Now, we have shown as a credit, as on the 11th of Auni last (corresponding to 24th June 1096), from *tavanai* (i.e., term-loan) account, Rs. 3,000, this (sum of) rupees three thousand (only) for 2 *tavanai* (—s) (i.e., terms of two months each) at a premium of Re. 0-1-9. We will send the principal and interest as per the due date. Please send the former signed letter.

Other particulars afterwards. Yours,

Under (the deity) Maliayilingam's protection,  
V. R. S. A. R. RAMAN CHETTY.

The first point for decision is as to whether the document is an instrument as defined in the Stamp Act. If it is not an instrument, it is not liable to duty at all. 'Instrument' is defined in section 2 (14) of the Stamp Act, 1899, as follows :—

"Instrument includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded."

The document only can be looked at, in my opinion, to come to a decision, and for this purpose oral evidence as to its meaning is inadmissible.

Looking at the document, on the face of, to my mind, the writer clearly binds himself to pay the sum of Rs. 3,000 and interest on a certain date and creates a liability to this effect. I am therefore of opinion that it comes within the definition of instrument as defined

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VR.S.A.R.  
RAMAN  
CHETTY.  
—

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—  
*n re*  
*M.S.A.R.*  
*AMAN*  
*CHETTY.*  
 —

The next point is as to the amount of duty chargeable on it. It does not seem to me to be a promissory note. It contains matter other than a promise to pay certain money. In its body it does not contain an undertaking to pay a certain sum to any specified person, though it may possibly be inferred that the money is to be paid to the firm of M.S.A.P.L. It shows that over two months prior to its execution the writer credited to himself Rs. 3,000 of money of M.S.A.P.L. ; and then goes on to bind himself to repayment.

Whether by virtue of the custom of Chetty firms dealing amongst themselves or otherwise, in my opinion an agreement may be inferred from the terms of the instrument and I consider that it is chargeable under article 5 (b) of Schedule I with a duty of eight annas.

*Irwin, Offg. C.J.*—I agree with Mr. Justice Hartnoll, and I think the document is a memorandum of an agreement, and chargeable with a duty of eight annas under article 5 (b) of the first schedule to the Stamp Act, 1899. Although the document is in the form of a letter it cannot be regarded as a mere offer. It records a transaction which (it may be inferred) had been agreed upon and effected two months before the document was written.

#### Full Bench—(Civil Reference.)

*in Re-*  
*ference*  
*1 of*  
*908.*

*Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge,  
 Mr. Justice Hartnoll, and Mr. Justice Ormond.*

*In re K. M. K. R. KUMARAPPA CHETTY.\**

*at 11th,*  
*908.*

*Young*—Government Advocate. | *Chari*—for opposing parties.

*Acknowledgment—Stipulation to pay interest—Memorandum of agreement—  
 Entry in account book—Indian Stamp Act, 1899, Schedule I, articles 1, 5 (b).*

An entry in a creditor's account book, signed by the debtor, contained an acknowledgment of the receipt of a certain sum of money, with the addition of the words 'at a premium of one anna and six pies above the two months' *tavanai* interest.'

*Held* (Ormond, J., dissenting),—that the addition of these words constituted a stipulation to pay interest, and rendered the entry a memorandum of agreement chargeable with a duty of eight annas under article 5 (b) of Schedule I of the Stamp Act, 1899.

*Mulchand Lala v. Kashiballav Biswas*, (1907) I.L.R. 35 Cal., III ; *Laxumibai v. Ganesh Raghunath*, (1900) I.L.R. Bom., 373 ; followed.

*Udit Upadhyaya v. Bhawani Din*, (1904) I.L.R. 27 All., 84, dissented from.

*Hira Lal Sircar v. Queen-Empress*, (1895) I.L.R. 22 Cal., 757, referred to.

The following reference was made by the Financial Commissioner, Burma, under section 57, sub-section (1), of the Indian Stamp Act, 1899 :—

Under the provisions of section 57, sub-section (1), of the Indian Stamp Act, 1899 (II of 1899), I refer the following case to the Chief Court of Lower Burma.

\* In the matter of a reference made by the Financial Commissioner, Burma, under section 57, sub-section (1), of the Indian Stamp Act, 1899, as amended by the Lower Burma Courts Act, 1900.

The document at page 3 of the proceeding quoted in the preamble was impounded by the Chief Court as being chargeable under article 1, Schedule I, of the Stamp Act as an acknowledgment. I differ from this view. It appears to me that the signed entry in the book is more than a mere acknowledgment. The object of getting the borrower, Kumarappa Chetty, to sign the entry setting out that the borrower had received Rs. 5,000, that the loan was for six months and that the rate of interest payable was that specified, was, I take it, to get an admission from the borrower that he accepted the loan on these conditions.

The mention of interest amounts, I think, to a distinct stipulation as to interest, and brings the entry within the proviso to article 1, Schedule I, of the Stamp Act.

Under the earlier Stamp Acts signed entries such as the one now in question were from time to time held to be mere acknowledgments liable to a duty of one anna. The addition of the proviso under Act II of 1899, however alters the position, and it seems to me that the entry now in question cannot be held to be a simple acknowledgment falling under article 1, Schedule I.

The signed entry appears clearly to indicate an admitted obligation on the part of Kumarappa Chetty to repay the principal after a certain minimum period, together with an indefinite amount of interest calculated at a certain specified rate. This, I think, makes the instrument an agreement chargeable with a duty of eight annas under article 5 (b), Schedule I, of the Stamp Act.

*The opinion of the Bench was as follows :—*

*Ormond, J.*—The question referred is whether an entry in an account book signed by the debtor, showing that Rs. 5,000 had been taken for a certain period, bearing interest at Re. 0-1-6 above the Chetty rate, is an acknowledgment under article 1 of Schedule I of the Stamp Act and liable to a stamp of one anna; or whether it is a memorandum of agreement and chargeable with a stamp of eight annas under article 5 (b) of the same schedule.

The entry is as follows :—

16th Vykasi, Parabha year (corresponding to 29th May 1906) credit P.L.K.N shop (and) debit K.M.K.R. shop with the sum taken for 3 *tavanais* (i.e., terms) at a premium of Re. 0-1-6 above the 2 months' *tavanai* (i.e., term-loan) interest Rs. 5,000 for which (sum of) rupees five thousand only.—K.M.K.R. KUMARAPPA CHETTY.

We have been referred to the three following authorities :—*Mulchand Lala v. Kashibullav Biswas* (1), in which an entry on a piece of paper addressed to the creditor and signed by the debtor, showing a certain sum to be due to the creditor and concluding with the words, "This amount will bear interest at the rate of Re. 1-8-0 per cent per mensem," was held to be an agreement because of the stipulation to pay interest.

In *Laxumibai v. Ganesh Raghunath* (2), the entry, which ran as follows, "This day Rs. 241 I received. The interest thereon is by

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M. K. R.  
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CHETTY.

agreement fixed to be at the rate of Re. 0-12-0 per cent per month. This is the account in respect of the same," was also held to be an agreement because of the provisions for interest.

In *Udit Upadhyaya v. Bhawani Din* (3), the following entry, "Account of . . . 8th February 1901, interest 1 per cent per mensem, payable 3rd May 1901, Rs. 500 borrowed from Udit Upadhyaya for a sugar factory," was held to be neither a promissory note nor an acknowledgment of a debt containing a promise to repay the debt or a stipulation to pay interest.

In the first two cases there was something more than a mere statement that the debt which was acknowledged carried interest. In one case the words are: "This amount will bear interest . . ." and in the other: "This interest is by agreement fixed to be, etc."

The Allahabad case is very similar to the present case and I think it was very correctly decided in that case, that there was no stipulation to pay interest.

In *Hira Lal Sircar v. Queen Empress* (4), an entry in a creditor's account book, signed by the debtor on a one-anna stamp and attested by two witnesses, which was as follows, "Rs. 75 is taken by me as loan. I shall pay interest on it at the rate of Re. 1 per cent per mensem," was held to be an acknowledgment and not a bond, on the ground that the obligation to repay was not created by the documents. The judgment states that the document was in form an acknowledgment only, and the mere fact that it contained a memorandum as to the rate of interest at which the loan was made, and was attested by witnesses, was not sufficient to convert what would otherwise be a mere acknowledgment into a bond, which itself creates an obligation to pay the money. The case was decided before the present proviso to article 1 was inserted in the Stamp Act; and no doubt the document would now come within the proviso, there being an express promise to pay interest. The question whether the document amounted to a memorandum of agreement was not raised; but I think it is an authority to show that a document which purports to be an acknowledgment of a debt which carries interest should still be held to be an acknowledgment only, unless it contains an express promise or stipulation to pay.

In the present case it does not appear that the account book which contains the entry was left by the debtor in the creditor's possession; but I assume that it was so for the purposes of this reference.

Although in an unqualified acknowledgment a promise to pay may generally be inferred, the distinction between an acknowledgment and a promise to pay is clearly recognized in the Stamp Act. In the document in question there is, I think, no more a stipulation for the payment of interest than there is a promise to pay the debt. It has to be inferred from the acknowledgment. The promise or stipulation to pay referred to in the proviso to article 1 must, in my opinion, be expressed and not merely capable of being inferred; and if the Legislature intended otherwise, I think it would have said so.

(3) (1904) I.L.R. 27 All., 84.

(4) (1895) I.L.R. 22 Cal., 757.

If the entry was made in the creditor's book, I think it is an acknowledgment of a debt that carries interest. In effect it is an admission by the debtor that he owes the creditor Rs. 5,000 with interest from a certain date (there is nothing to show when the debtor signed the entry); and that he will owe him—not necessarily that he will pay him—further interest as time goes on.

In my opinion the document is sufficiently stamped with a one-anna stamp as an acknowledgment under article 1 of the Stamp Act.

*Irwin, Offg. C. J.*—The document which forms the subject of this case is an entry in the creditor's account book, signed by the debtor. It certainly contains an acknowledgment of a debt of Rs. 5,000, and the question is whether the words "at a premium of one anna and six pies above the two months' *tavanai* interest" make it chargeable as an agreement or memorandum of agreement.

The proviso to article 1 of the first schedule to the Stamp Act, 1899, runs thus :—"Provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property." From the way the words are used it seems to me plain that "stipulation" is not intended to mean exactly the same thing as "promise." In Desai's Dictionary of Law Terms I find "stipulation" defined as "a bargain; proviso; condition." A promise to pay the debt is contrasted with a stipulation to pay interest. I think the correct inference is that the word "stipulation" includes not merely an express promise to pay but also a bare condition that interest shall be payable. The condition that interest shall be payable is clearly set out in the part of the document which I have quoted above. My opinion is that these words not only exclude the document from the operation of article 1, but they also constitute a memorandum of an agreement to pay interest, and thereby bring the document within the operation of article 5 (b).

In this view I am supported by the rulings of the High Court at Bombay in *Laxumibai v. Ganesh Raghunath* (2), and the High Court at Calcutta in *Mulchand Lala v. Kashibullav Biswas* (1). The High Court at Allahabad in *Udit Upadhyay v. Bhawani Din* (3) held that a document in substantially similar terms was "mere memorandum or note drawn up between the parties as to a transaction which had just been settled between them." I agree with that, if for "transaction" we read "agreement," but we all respect I do not understand how the learned Judges arrived at the conclusion that the document was not chargeable with stamp duty as a memorandum of an agreement.

My answer to the reference is that the document is a memorandum of an agreement, chargeable with a duty of eight annas under article 5 (b), Schedule I, of the Stamp Act, 1899.

*Hartnoll, J.*—I concur in the opinion expressed by the learned Chief Judge. The entry seems to me to be more than a mere acknowledgment of a debt. It fixes the time for which the Rs. 5,000 is taken, and also fixes the interest to be paid on the principal sum. I agree that the words "stipulation to pay interest" used in article 1 of

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Schedule I of the Stamp Act, 1899, apply in the case under reference. It does not seem to me necessary that for them to apply to any particular case there should be an express promise to pay interest, and in my opinion they apply where the entry contains words to the effect that interest is payable on the debt. The mere condition that interest is made payable on the debt makes an entry to this effect more than a mere acknowledgment, in my opinion, for it creates a fresh liability in addition to the liability to repay the principal sum.

I consider that the entry should be stamped as a memorandum of an agreement under article 5 (b) of Schedule I of the Stamp Act, 1899, with a duty of eight annas.

*Civil*  
*Revision*  
No. 38 of  
1908.

August 20th,  
1908.

*Before Mr. Justice Hartnoll.*

THE BRITISH INDIA STEAM NAVIGATION COMPANY,  
LIMITED *v* A. H. DADABHOY.

*Lentaigne*—for applicants (defendants). | *Lambert*—for respondent (plaintiff).  
*Destruction of cargo—Packing of perishable goods—Onions—Obliteration of marks*  
*—Unidentified goods—Shipping—Responsibility of steamship company.*

A quantity of onions were shipped from Madras, consigned to various persons, amongst them A, B and C, at Moulmein. They were packed in bags and baskets and the bills of lading were endorsed 'Onions bags and baskets frail. Carried at shippers' risk. Steamer not responsible for condition or outturn of contents.'

On the arrival of onions at Moulmein, a number of them were found to be bad, and were forthwith destroyed by order of the Municipality. The marks on the destroyed packages had become obliterated during the voyage. Certain other packages remained undelivered owing to obliteration of marks. A, B and C each received less than his consignment. They were offered, but refused to accept portions of the undelivered packages, which were eventually destroyed.

A, B and C sued the steamship company for short delivery, not alleging negligence, but contending that the company was bound to show what had become of the actual packages consigned to them but not delivered. The company, although unable to identify the destroyed and undelivered packages, accounted for the whole number of packages consigned.

*Held*,—that in view of the perishable nature of the goods and the frailty of the packing, the steamship company could not be held liable for the packages destroyed; and that as regards the packages undelivered for want of marks, the consignees became tenants in common thereof in proportion to the quantities that should have been delivered to each of them; that A, B and C, therefore, having refused the shares offered to them, could not hold the company responsible.

*Spence v. The Union Marine Insurance Company, Limited*, L.R. 3 C.P., 427; *Smurthwaite v. Hannay*, (1894) L.R. Appeal Cases, 494, at pages 505 and 507; followed.

Civil Revisions Nos. 39 and 40 have been heard with this one and it will be convenient to write one judgment in all three cases.


In July 1907, 2,035 baskets of onions were shipped from Madras to Moulmein by the British India Steam Navigation Company. They travelled to Rangoon by the S.S. "Bharata," and were there transhipped to the S.S. "Rasmara" and S.S. "Ramapoora" and conveyed to Moulmein in three different voyages. Three of the consignees of these onions were A. H. Dadabhoy, E. H. Dadabhoy and M. D. Parrack, and to them were consigned 100, 100 and 150 baskets, respectively. A. H. Dadabhoy pleads that he only received 70 baskets, and so he sued the company for short delivery of 30 baskets. Under similar

circumstances E. H. Dadabhoy and M. D. Parrack respectively sued the company for short delivery of 25 and 54 baskets. The company denied their liability by reason of the clauses of their bills of lading, and they especially rely on the endorsement on the bills: "Onions bags and baskets frail. Carried at shippers' risk. Steamer not responsible for condition or outturn of contents." On the merits of the case they pleaded that the 2,035 baskets were shipped to 17 consignees in Moulmein and arrived in Rangoon on the 21st July (a Sunday, when no transshipment is done), and that the consignment was reshipped to Moulmein as follows:—

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THE BRIT  
INDIA STEAM  
NAVIGATION  
COY., LIM  
TED.  
v.  
A. H. DAI  
BHOY.

	Baskets.
On the 24th July by "Rasmara" ...	1,335
On the 26th July by "Ramapoor" ...	650
On the 29th July by "Rasmara" ...	50 (continued in 11 bags).
Total ..	2,035

The company stated that by order of the Municipality 176 baskets and the 11 bags were destroyed owing to the deterioration of their contents, and that after delivery 32 baskets still remained in the godown, and they urged that owing to the baskets being frail and their contents having become bad and the consequent obliteration and destruction of all marks, it was impossible to say to whom any portion of the 258 baskets were consigned. It was therefore submitted that the plaintiffs should bear a rateable proportion of the loss. It was further stated that the plaintiffs had been offered a portion of the 32 baskets in the godown, which they refused to accept. The Judge of the Small Cause Court granted the decrees asked for, and so these applications in revision have been made. The ground of the decision of the Small Cause Court may be described in the following words taken from A. H. Dadabhoy's case: "The claim is one for short delivery, and it is quite clear that before the defendants can claim freedom from liability and in consequence of the terms of the bill of lading, it is incumbent upon them to show what has become of the plaintiff's 30

baskets bearing the mark . Plaintiff is not bound to accept deli-

very of baskets that are not shown to have been consigned to him. Undoubtedly a large number of baskets had to be destroyed by the Municipality, but the baskets belonging to the plaintiff were included defendants have failed to prove."

The grounds on which revision is asked for are on the same line as the original defence, and special attention is invited to the rule of law laid down in the case of *Spence v. The Union Marine Insurance Company, Limited*, (1) the principle of which was approved in *Smurthwaite v. Hannay* (2). For the respondents it was not urged that the onions had been damaged owing to the negligence of the defendant company; but it was urged as follows. The case quoted

(1) L.R. 3 C.P., 427.

(2) (1894) L.R. Appeal Cases, 494, at pp. 505 and 507.

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, LIM-  
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v.  
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HOY.

does not apply as only one vessel was concerned in it. Here the onions started in one vessel and were transhipped from Rangoon to Moulmein in two other vessels to undergo three voyages. Therefore the defendant company has to show what has become of each cargo. There is nothing to show that the undamaged baskets were properly delivered, and it cannot be assumed that the undamaged baskets went to the correct owners. If it can be shown that the onions were destroyed in a manner which, according to the terms of the bill of lading, renders the company immune there is an end of the matter. Some of the baskets consigned to the plaintiffs may have been delivered to other people.

From a perusal of the evidence it seems to me that the company have accounted for the whole 2,035 baskets—

	Baskets.
By the "Rasmara" on the 24th July were shipped ...	1,335
„ "Ramapoor" on the 26th July " ...	650
„ "Rasmara" " 29th July " ...	50
Total ...	<u>2,035</u>

It is shown that these onions were in frail baskets and marked in a very insecure manner, so that the marks would easily become obliterated. Mr. Whittam, the Wharf Superintendent, states that only 70 identifiable baskets for A. H. Dadabhoy arrived, and only 75 arrived for E.H. Dadabhoy, and only 96 for M. D. Parrack. It is clearly his duty to check the manifests, and I think that it may be taken as proved that if other distinguishable baskets had come for the plaintiffs, he would have seen them and delivered them. From his evidence it may be considered proved that none of the plaintiffs' baskets were delivered to those not entitled to them. As to whether any of the plaintiffs' baskets were left behind in Rangoon there is the evidence of Paul and Fergusson. They are employees of the company and dealt with the transhipment. It is not shown that they were negligent, and I think that it must be taken that they acted as ordinary and prudent men and did not keep back Moulmein cargo at Rangoon. The evidence is to the effect that out of the first consignment 14 bags were destroyed by order of the Municipality, and that out of the second consignment 162 baskets were again so destroyed. The 11 bags containing the 50 baskets were also destroyed. Apparently the onions sweated and became rotten, and destroyed the marks on the baskets or rendered them illegible. Amongst the onions so destroyed, as the company have accounted for the whole 2,035 baskets, must have been some of the baskets belonging to the plaintiffs. Are the company liable for this loss? In my opinion they are not. Onions shipped from Madras to Moulmein with transhipment in Rangoon and packed in frail baskets are most perishable goods, and the company only carried them at shippers' risk disclaiming any responsibility for condition or outturn of contents. It is not alleged that they were negligent in the carrying of the baskets, and it only stands to reason that in the ordinary course at such a season—the monsoon—such perishable articles so packed would stand a good chance of becoming damaged. If such damages

so occurred, certainly in the absence of any proof of negligence on the part of the carriers it seems to me that the loss should fall on the owners of the goods. This decision disposes of the question of liability for all the baskets destroyed by order of the Municipality.

There remains the question of the 32 baskets out of the first and second consignments from Rangoon to Moulmein which were housed in the godown and of which the plaintiffs were offered their proportionate share, but which they refused to take, with the result that on the 30th August the whole 32 baskets were destroyed as rotten. It appears that these baskets bore no marks. I am of opinion that the rule of law laid down in the case of *Spence v. The Union Marine Insurance Company, Limited* (1) applies to their case. The unsubstantial and loose marks on these frail baskets become obliterated through no proved or alleged negligible conduct on behalf of the company. The several owners of the consignments therefore became tenants in common of these baskets in proportion to the quantities which should have been delivered to them respectively. The plaintiffs refused to take their shares though offered, and cannot now hold the defendant company responsible. It has been urged that the transshipment in Rangoon to the "Rasmara" and "Ramapoor" alters the aspect of the case. I cannot see that it does. The plaintiffs refused to have anything to do with the 32 baskets whatsoever, and so the question did not arise whether the calculation should take place on the whole 2,035 baskets carried by the "Bharata," or whether it should take place on the quantity carried in each of the voyages of the "Rasmara" and "Ramapoor." There were no doubt manifests for each voyage of each vessel.

I accordingly in A. H. Dadabhoy's case set aside the decree of the Small Cause Court and dismiss his suit with costs in both Courts.

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INDIA STEAM  
NAVIGATION  
COY.,  
LIMITED  
v.  
A. H. DADABHOY.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.

PO SO v. MA KYIN ME.

Agabeg—for applicant. | R. M. Das—for respondent.

Dismissal of application for maintenance no bar to subsequent order—  
*Res judicata*—Criminal Procedure Code, ss. 403, 488.

The dismissal of an application for maintenance does not constitute a legal bar to an order granting maintenance on a subsequent application.

*Laraiti v. Ram Dial*, (1882) I.L.R. 5 All., 224, dissented from.

The parties are husband and wife, living apart. On 2nd March respondent applied to the Subdivisional Magistrate for an order for applicant to pay an allowance for the support of their child. The Magistrate wrote :—" Respondent offers to maintain the complainant in a separate house but she refuses to accept the offer. She alleges no ill-treatment. I have consequently no power to interfere. Case dismissed."

This Magistrate was transferred, and on 6th April the respondent applied to his successor for an order for maintenance for the child. The case was duly heard, and an order made to pay Rs. 5 per month.

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I am asked to revise that order on the grounds that the order dismissing the first petition was a bar to the second, and that there was no evidence that petitioner had any means.

Petitioner relies on the case of *Laraili v. Ram Dial* (1) in which Mr. Justice Mahmood said that on the general principle of *res judicata* the Magistrate was wrong in law in reopening a matter of maintenance, which had already been adjudicated on by another Magistrate. The second Magistrate did not know of the proceedings of the former Magistrate.

With all respect I would say that *res judicata* does not bar any proceedings by general principle, but only by specific enactments, as contained in section 13 of the Code of Civil Procedure and section 403 of the Code of Criminal Procedure. It is not contended that either of those sections applies to the present case. I would certainly say that when a Magistrate to whom an application is made knows or has reason to believe that a similar application on the same facts has previously been adjudicated on, he ought not to act on the application without considering the previous decision, but I am unable to say that he is wrong in law when he does so, and that his proceedings are therefore bad and void regardless of the merits.

Moreover, in this case the former Magistrate seems to have misapprehended the nature of the application. His order appears to be one refusing to make an order of maintenance for the wife, which was not applied for. He did not really adjudicate on the application for maintenance for the child.

Thirdly, the second Magistrate has done substantial justice, and this is a sufficient reason for refusing to interfere in revision.

There is nothing in the second point. Petitioner is living with his mother, who has means, and he has married another wife. I entirely decline to presume that he is without means.

The application is dismissed.

Criminal  
Appeal  
No. 513 of  
1908.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge.

PO KA v. KING-EMPEROR.

August 28th,  
1908.

Appealable sentence at summary trial—Judgment in summary trial—Substance of evidence—Criminal Procedure Code, ss. 262, 264.

When an appealable sentence is passed at a summary trial, the record must be such as to enable the Appellate Court to form its own opinion on the evidence.

Meaning of "substance of the evidence" explained.

The appellant was tried summarily and sentenced to six months' rigorous imprisonment. The sentence is illegal; no sentence exceeding three months may be passed at a summary trial,—section 262 (2), Code of Criminal Procedure.

There is another defect in the record. If the sentence were legal, it would be appealable, and in such a case the Magistrate is bound to record the substance of the evidence, in addition to the particulars

specified in section 263, Code of Criminal Procedure. The Magistrate begins, "The evidence of Nos. 1 and 2 witnesses for the prosecution show," and then he gives in eight lines the facts which he considered proved by the evidence of those two witnesses. This would be a suitable "brief statement of the reasons for the finding" if the sentence were not appealable, but it is not a compliance with the requirement of section 264 to record a judgment embodying the substance of the evidence. It is essential that the substance of the evidence should be recorded in such a way that the Court of appeal will be able to form an opinion whether the evidence is sufficient to support a conviction. The substance of the evidence is a matter quite distinct from the facts which may be considered as proved by the evidence.

The personality of each witness and the circumstances in which he was in a position to observe relevant facts should appear, briefly but clearly, on the record. When the record is not such as to enable the Appellate Court to form its own opinion on the evidence, the conviction cannot properly be upheld on appeal.

It is obvious that the present case ought not to have been tried summarily, because an adequate sentence cannot be passed in a summary trial.

I set aside the conviction and sentence, and direct that the appellant be retried in a regular trial.

*E. fore Mr. Justice Irwin, C.S.I., Officiating Chief Judge.*

**SAN GAING v. KING-EMPEROR.**

*Power of High Court in revision—Jurisdiction—Revision of Civil Court's order for prosecution—Criminal Procedure Code, ss. 439, 476.*

The Subdivisional Court acting under section 476 of the Code of Criminal Procedure ordered the prosecution of A for giving false evidence. A thereupon applied for revision of the order to the Sessions Judge, who submitted the proceedings to the High Court with the recommendation that the order should be quashed.

*Held*,—that section 439 of the Code of Criminal Procedure does not confer jurisdiction to interfere with the order of a civil Court made under section 476.

*A. K. Nur Mahomed v. Aung Gyi*, 3 L.B.R., 234, referred to.

*Ramzan Ali v. Oporno Charan Chowdry*, 4 L.B.R., 138, followed.

The Judge of the Subdivisional Court of Ngathainggyaung recorded an order which ends with the following sentence, "I sanction the prosecution of the witness Maung San Gaing for committing perjury, and send the case for trial and disposal, under section 193, Indian Penal Code, or other proper section, to the Additional Magistrate, Ngathainggyaung."

Application for revision of that order was made to the Sessions Judge, who recommends that the order be quashed. He says that the Chief Court has held that an application for review of an order passed under section 476, Code of Criminal Procedure, is maintainable. The learned Judge was probably thinking of the case of *A. K. Nur Mahomed v. Aung Gyi* (1). That referred only to an order made under section 476 by a criminal Court. In *Ramzan Ali v. Oporno Charan Chowdry* (2), it was held that section 439 of the Code of Criminal

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(2) 4 L.B.R., 138.

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—

Procedure does not empower a High Court to revise an order of a civil Court made under section 195 of the Code of Criminal Procedure. The reason I gave for that opinion namely, that Chapter XXXII of the Code of Criminal Procedure contains no indication that it gives the High Court power to interfere with the proceedings of a Court which is not, *qua* the Code of Criminal Procedure, subordinate to it, applies equally to an order of a civil Court made under section 476. Section 435 is expressly confined to the records of inferior criminal Courts. I find it impossible to hold that a proceeding which the High Court has no power to call for may be revised by the High Court under section 439 if it happens to come to the knowledge of that Court in some other way. The Sessions Judge obviously had no power to call for the record of a civil Court.

The form of the Subdivisional Judge's order was bad, so far as it purports to sanction a prosecution, as explained in the former of the two cases just cited.

The application is dismissed.

### Full Bench—(Criminal Revision).

Criminal  
Revision  
No. 83B of  
1908.

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge,  
Mr. Justice Hartnoll, and Mr. Justice Ormond.

MA KA · U v. PO SAW.

Rahman—for respondent.

August 31st.  
1908.

Maintenance, Ground for refusing order for—Buddhist Law: Husband and wife—Polygamy—Refusal to live with husband and second wife—Criminal Procedure Code, s. 488.

Where a Burman Buddhist has taken a lesser wife without the consent of his chief wife, the refusal by the chief wife to live with her husband in the same house with the lesser wife does not necessarily deprive her of her right to maintenance under section 488 of the Code of Criminal Procedure.

*Ma The v. Maung Tha E*, 1 U.B.R. (1897—1901), 104; *Maung Kin v. Ma Hnin Yi*, S.J., L.B., 114; *Ma In Than v. Maung Saw Hla*, S.J., L.B., 103; *Maung Kauk v. Ma Han*, 1 Chan Toon's L.C., 98; 2 U.B.R. (1892—96), 48; *Po Nyun v. Ma Su*, Criminal Revision No. 1318 of 1906 of this Court (unreported); *Maung San Hla v. Ma On Bwin*, 2 L.B.R., 46; referred to, *Pwa Thin v. Ba Win*, 4 L.B.R., 146, overruled.

*Hartnoll, J.*—Ma Ka U applied under section 488 of the Criminal Procedure Code to obtain maintenance for herself at the rate of Rs. 30 a month from her husband, Maung Po Saw, alleging that some six years ago she, a widow, and Maung Po Saw, previously unmarried, had become man and wife, that in 1269 B.E., about the month of Tagu, Maung Po Saw had taken a lesser wife named Ma Mya and had kept her apart, that on the 13th waxing Thadingyut of the same year Maung Po Saw had left her (the petitioner's) house and had gone to live with his lesser wife, and that he had not returned to her and had given her neither food, clothing, nor house rent, and had abandoned her, and had also refused to give her maintenance. She therefore asked for Rs. 30 a month as he was a clerk drawing Rs. 80 a month.

Maung Po Saw repudiated his liability for the following reasons:



wife although she had been called on to do so ; (2) that she was living in separation of her own accord and consent ; (3) that she could maintain herself but would not wilfully do so ; (4) that she was a most vindictive, spiteful and improper person, having assaulted him several times and having instigated false cases against him ; (5) that after a certain criminal case was finished he was going to sue her for divorce owing to her bad conduct.

At the magisterial enquiry it appeared that the parties had been leading a quarrelsome life in the past, and Ma Ka U stated that she refused to live with Maung Po Saw in the same house as the lesser wife, thought she would do so if she were provided with a separate residence in which she could live by herself. The Magistrate dismissed the application on the ground that the petitioner had refused for no sufficient reason to live with Maung Po Saw and that the taking of a lesser wife was not a sufficient reason for her refusing to live with him. Ma Ka U on this applied for a revision of this order to the learned Sessions Judge, who has referred the matter to this Court with an expression of the opinion that a head wife is justified in refusing to live in the same house as a lesser wife and that she is entitled to claim a separate residence, when her husband takes a lesser wife. He would therefore give her maintenance, as she was willing to cohabit with her husband if provided with a separate residence. In the course of the referring order the Sessions Judge states that according to the Dhammathats a wife whose husband takes a lesser wife without her consent is entitled to a divorce; that on divorce the jointly acquired property would go to the wife, and that the husband would have to be expelled from the house leaving even his clothes behind. He further stated that as a Magistrate he had decided a great many applications for maintenance in which this very question had arisen, and that in accordance with the usual practice he had always held that a man who chose to take a lesser wife against the will of his head wife was bound, if required by her to do so, to provide a separate house for each.

As Maung Po Saw's other objections have fallen to the ground the only point for decision is whether the refusal of a head wife to live and cohabit with her husband who has taken a lesser wife, both parties being Burmese Buddhists, unless she is provided with a separate residence, is a sufficient reason for refusing her maintenance under section 488 of the Code of Criminal Procedure, and in order to a determination of the question I propose first to examine the Dhammathats, secondly to examine the course of judicial decision, and thirdly to consider the present conditions of social life amongst the Burmese Buddhists with a view to seeing what is a fit and proper order to pass.

An examination of the Digest of the Burmese Buddhist Law on marriage compiled by the late Kinwun Mingyi seems to me to lead to the conclusion that, though polygamy is recognized amongst Burmese Buddhists, it is not looked on with favour nor as the ideal and ordinary social life to be held. Section 91 contains texts sanctioning a polygamous life, but they describe the hard case of a man who by concealing the existence of his former wife obtains a second one, and what is to be

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done when the former wife appears. The texts clearly refer to a social life of antiquity and could not be applied to present conditions. Section 137 seems to refer to the case of a man who has been intimate with three women, so that they all have claims on him. According to the *Rasi Dhammathat*, it is open to him to marry all of them if he wishes. The section seems to provide for a special case. We then come to the sections containing the duties of married people to each other and the good qualities of a husband and wife. All three *Dhammathats* quoted in section 208 lay down the duty of the husband to be faithful to his wife, and, according to the *Cittara*, by not seeking lesser wives or concubines. She is also to be given a free hand in the management and control of the house and property. Section 210 lays down the qualities of a good husband. The *Kaingza* says he should provide his wife with a good house and maintain her, his children, and slaves with tender watchfulness. The *Myingun* says that he is to mildly instruct and wisely advise his wife and children and to abstain from liquor and avoid irregular habits. The *Vannana* says that he should love and cherish his wife and children. And so on. All this is inconsistent with the taking of another wife which in many cases would tend to bring discord into the house at once. The sections about this part of the Digest all seem to contemplate a monogamous condition of society. In section 214 the *Dhammathatkyaw* says that a husband should not make his wife feel anxious and jealous by being unfaithful to her, while the *Kyannet* says that an excellent rule for the husband and wife is to promote each other's happiness. On arriving at section 219 it is seen under what conditions a second wife can be taken. There must be a fault in the first wife such as barrenness, bearing daughters only, leprosy or bad conduct. The *Manugye* says that in such circumstances the first wife has no right to protest against the taking of another. The Digest then goes on to discuss and lay down further rules for the conduct of a monogamous life. In this part of it therefore polygamy seems to be only sanctioned when there is a fault on the part of the wife. In section 237 the *Dhammathatkyaw* lays great stress on both husband and wife being good and virtuous and in that case on the happiness and prosperity that will accrue. Section 244 and *sequitur* lay down the rules as to a husband maintaining his wife when he goes on a journey and as to the time she is to wait for him without remarriage. Section 245 recognises a polygamous state when a husband marries another woman when away. Then comes section 253, where the text of the *Kaingza*, *Kandaw* and *Panam* is given to the following effect :—

A man may marry as many as ten wives, if he can maintain them all by his own skill and labour. Although his parents may give him in marriage to another woman after he has already been married to one, the parents of the first wife shall not recover her.

It should be noted that only three *Dhammathats* have this text, and that the principle it enunciates is quite inconsistent with what has preceded where a polygamous condition is only contemplated for a

ordinary state contemplated all through these sections has been monogamy.

The next portion of the Digest deals with divorce, and it begins by considering cases in which there is only one wife; but in section 256 the consequences of incontinence are dealt with, and their result is that the taking of a lesser wife is a ground for the head wife seeking and obtaining a divorce, and in that case the majority of the texts give the whole of the property to the wife. It is quite clear that the texts look on the taking of a lesser wife as a matrimonial fault. Section 259 deals with the case of persons who have been previously married. The text is from a recently compiled treatise and makes the taking of a lesser wife a matrimonial fault attended with penalties as regards property. The next section deal with a monogamous household until section 265 is reached. That and the following sections deal with the divorce of a wife for the reasons given in section 219, but it should be noticed that section 267 contains considerable restrictions on the abandonment of a woman afflicted with disease. The texts of section 271 discountenance very strongly divorce for no sufficient cause. Most of the remaining sections on divorce deal with a monogamous state. I would, however, refer to section 303, where three of the texts combine cruelty with the keeping of a lesser wife. Several of the texts are to the effect that for a second act of cruelty the husband has to leave the house with only a suit of clothes. It is only natural to assume that, where a husband without the consent of his wife introduces a lesser wife into the ordinary Burmese house, in due course will follow the ill-treatment of the head wife. Again the text quoted in section 311 lays stress on a husband who has a wife afflicted with a long-standing disease obtaining her assent prior to his taking another wife.

The next portion of the Digest deals with adultery and many of the sections are not relevant to the point at issue, but I would mention two of them. Section 397 quoted texts imposing a penalty on a man for taking a lesser wife. The first two Dhammathats make this penalty expulsion from the house after leaving behind even his clothes. The last Dhammathat lays down the same penalty with the liability to discharge all debts, and says that the taking of the lesser wife must be against the wishes of the chief wife for the penalty to be incurred. Three of the text quoted in section 439 forbid the giving of the chief wife's property to a lesser wife or mistress.

From a consideration of these texts it seems to me clear that the Dhammathats do not in themselves sanction unlimited polygamy with the exception of the texts quoted in section 253 of the Digest, even supposing that the meaning and intention of these texts is to so sanction it. The Dhammathats seem to allow polygamy or the taking of a second wife under certain exceptional cases, and that is all, and they contemplate that the ordinary social life should be monogamous. There is authority for holding that the taking of a lesser wife and consequent ill-treatment of the chief wife shall end in the husband having to leave the house and forfeit the property, and certain texts go even further and authorize the obtaining of a divorce by the wife, when her husband takes as second wife.

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That portion of the Digest that deals with inheritance contains texts relating to a polygamous condition, and in this connection I would refer to the texts quoted in sections 8, 15, 58, 118, 181, 188, 203, 204, 205, 209, 210, 276, 277, 278, 283, 284, 285, and *sequitur*; but no conclusions can be drawn from them to decide the present question.

As regards the course of judicial decision on the point at issue I have only been able to find four cases. The first is that of *Ma The v. Maung Tha E* (1). In that case the applicant Ma The was a second wife, and so it is not comparable with the present one. Moreover, the question as to whether a wife is entitled to a separate establishment was not gone into from a consideration of the Dhammathats and the principles underlying them.

The second case is that of *Maung Kin v. Ma Hnin Yi* (2), in which it appears that Maung Kin took a second wife, and that Ma Hnin Yi, the head wife, lived separately. It was held that she was not entitled to claim maintenance for the children as she chose to live separately and to make her own arrangements. The case of *Ma In Than v. Maung Saw Hla* (3) was referred to, in which it was held that a husband who in the lifetime of his first wife marries a second wife without the first wife's consent does not thereby commit a fault against the first wife, and that such a second marriage does not in itself constitute a ground for divorce. The correctness of this decision was discussed incidentally in the case of *Maung Kauk v. Ma Han* (4). From a consideration of the texts of the Dhammathats that I have set out I am unable to agree with the decision in the case of *Ma In Than v. Maung Saw Hla* (3) to the effect that a Burman Buddhist husband who takes a second wife without the chief wife's consent does not thereby commit a fault against her. In my opinion he does do so, and he commits a serious fault against her. At the same time I express no opinion as to whether such a fault would constitute valid ground for a divorce, which is not a matter in issue. The third case is that of *Po Nyun v. Ma Su* (5). This was an application to revise an order of a Subdivisional Magistrate refusing to cancel or interfere with an order made by one of his predecessors ordering the applicant to pay Rs. 50 a month for the maintenance of his chief wife and his daughter Ma Su. One of the grounds taken was based on the applicant having called on his wife to come and live with him.

Fox, C.J., said :—

I am inclined to doubt whether the demand was *bona fide*. The applicant made an offer to provide the respondent, his chief wife, with a residence in which she would be mistress. He had written to her that he could not live apart from his mother. When his wife had lived with him and his mother, the ladies fell out. The wife as chief wife was, in my opinion, justified in refusing to return to live with him as long as she had no prospect of being provided with a residence suited to her station in which she would have a voice in the control of who, if any one, should live with them; in particular, she was not obliged to go and live in the same house with her mother-in-law, with whom she had quarrelled.

(1) U.B.R. (1897—1901), 104. | (3) S.J., L.B., 103.

Here, although the point at issue now was not put forward, it was held that she should have a voice in the control of whosoever should live in her home. The fourth case is that of *Pwa Thin v. Ba Win* (6), in which it was held that polygamy being legal among Burman Buddhists, the refusal of a chief wife to live with her husband merely because he has taken a second wife is a proper ground for refusing to make an order for her personal maintenance under section 488 of the Code of Criminal Procedure. It does not appear that the point at issue in this case was put forward or discussed.

I would now consider the present conditions of social life amongst Burmese Buddhists. After a long service in many parts of this country my experience has been that monogamy is the usual practice, and polygamy, though not very uncommon, is the exception. A Burman Buddhist now-a-days in accordance with present practice may take a second wife on grounds other than those given by the extracts from the Dhammathats quoted, but he does not as a rule take a second wife at all and so conforms to the principles of social life as laid down in the Dhammathats by only having one wife—at least that is my experience. The position of a Burman Buddhist woman is now not to any great extent inferior to that of a Burman Buddhist man. She and he own the jointly acquired property in common. She in many cases trades or works and helps to keep the establishment going. In such circumstances it is only reasonable to hold that she should have the right to object to another wife coming to the house where the property is jointly owned by herself and her husband, and which is kept going by their joint exertions.

I have therefore come to the following conclusions. The written treatises of the Burman Buddhist law do not favour polygamy, and only countenance it under certain exceptional cases if we exclude the texts quoted in section 253 of the Digest, which seem inconsistent with the principles laid down elsewhere. They clearly make the taking of a second wife a serious matrimonial fault. According to present day social conditions the bulk of the Burman Buddhists continue to carry out the principles generally inculcated by the Dhammathats in this respect, and conditions are such that it is only reasonable and proper to hold that where a married couple are living in a monogamous condition the wife should have the right to object to the introduction of another wife into the house without her permission, and that when the husband attempts so to do he commits a grave matrimonial fault. In these circumstances it follows that it is correct to hold that if a Burman Buddhist takes a second wife, where he only had one prior to such taking, without the consent of such wife, she is entitled to leave him and refuse to cohabit with him unless he provides her with a separate residence, and, if he will not do so, to obtain an order for her personal maintenance from him.

Applying this rule to the present case, Ma Ka U states that she is willing to live and cohabit with Maung Po Saw if he supplies her with

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not done so. She is therefore, in my opinion, entitled to personal maintenance. As Maung Po Saw draws Rs. 80 a month salary, Rs. 30 does not seem to be too much. I would therefore set aside the order of the first class Additional Magistrate, Bassein, and order and direct that Maung Po Saw do pay Ma Ka U Rs. 30 a month maintenance with effect from the 10th December 1907.

*Irwin, Offg. C.J.*—The cases of *Ma In Than v. Maung Saw Hla* (3), *Maung Kin v. Ma Hnin Yi* (2) and *Maung Kauk v. Ma Han* (4), cited by my learned colleague, were civil cases, and the principles which should guide a civil Court in granting or refusing an order for payment of maintenance are not necessarily identical with the principles by which a criminal Court ought to be guided in deciding applications under section 488 of the Code of Criminal Procedure. That was laid down by a Full Bench of this Court in *Maung San Hla v. Ma On Bwin* (7). Therefore, while the cases cited may throw some light on the subject, it is not necessary to say whether the Special Court was right or wrong in holding that a second marriage without the consent of the first wife does not constitute a fault which would entitle the first wife to a divorce, and I am not prepared either to endorse or to dissent from that proposition.

The law which governs the present case is the proviso which follows sub-section (3), but which is in substance a proviso to sub-section (1), of section 488 of the Code of Criminal Procedure, namely, "Provided that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing."

The question we have to decide is whether the respondent's refusal to maintain his chief wife affords just ground for ordering him to do so, notwithstanding her refusal to live in the same house with the second wife whom the respondent married without the consent of the chief wife.

The learned Chief Judge's decision in *Maung Po Nyun v. Ma Su* (5) is very much in point, and if I had known of its existence my decision in *Pwa Thin v. Ba Win* (6) might have been different.

I agree with Mr. Justice Hartnoll that neither the Dhammathats nor public opinion of Burmese Buddhists favours bigamy or polygamy; it is tolerated, but not largely practised. The taking of a lesser wife must frequently lead to dissensions and quarrels in the house. There is much force in the learned Sessions Judge's remark that if the chief wife cannot insist on keeping the second wife out of the house a Burman could with impunity marry a new wife every month, and desert the former wife, leaving her without redress.

I therefore agree that when a Burmese Buddhist marries a second wife without the consent of the chief wife, there may be just ground for ordering him to pay for the maintenance of the chief wife, though she

refuses to live in the same house with the lesser wife. I concur in the order proposed by Mr. Justice Hartnoll.

*Ormond, J.*—I agree with my learned colleagues in holding that where a Burmese Buddhist has taken a lesser wife without the consent of his chief wife, the refusal by the chief wife to live with her husband in the same house with the lesser wife does not necessarily deprive her of her right to maintenance under section 488, Code of Criminal Procedure.

I concur in the order suggested.

Before Mr. Justice Hartnoll.

MA THEIN YIN *v.* MESSRS. FOUCAR BROTHERS & Co.

*Higinbotham*—for appellant (plaintiff).

*Agabeg*—for respondents (defendants).

*Limitation of appeal—Time spent in prosecuting appeal in wrong Court—Due diligence—Good faith—Limitation Act, 1877, s. 14.*

A appealed to the Chief Court against a judgment passed by the District Court. It was held that the appeal lay to the Divisional Court. On being presented in that Court, it was dismissed as time-barred. A then appealed to the Chief Court against the order of dismissal. It was argued that the time spent in prosecuting the appeal in the Chief Court should be excluded under section 14 of the Limitation Act. But it appeared that A's counsel, at the time of advising her to appeal to the Chief Court, had not explained to her the course of previous litigation which had a bearing on the question of valuation.

*Held*,—that, A having failed to prove that she had put her counsel in possession of all the facts, had failed to prove that she acted with due care and attention; and that she had therefore not shown that she had prosecuted the appeal in the Chief Court in good faith, within the meaning of section 14.

*Krishna v. Chathappan*. (1889) I.L.R. 13 Mad. 269; *Sarat Chander Bose v. Saraswati Debi*, (1907) I.L.R. 34 Cal. 216; *Kura Mal v. Ram Nath*, (1906) I.L.R. 28 All. 414; referred to.

Ma Thein Yin filed a suit against Messrs. Foucar & Co., Limited, on the 16th January 1903, in the District Court of Amherst—

- (1) for a decree ordering the defendants to render an account of all timber dealt with by them by virtue of a power-of-attorney granted by her;
- (2) for a decree allowing to redeem her hammer-mark certificate on payment of such sum of money as might be found due on settlement of the said account;
- (3) for cancellation of the power granted by her in favour of the defendants;
- (4) for such further or other relief as the Court thought fit and proper; and
- (5) for costs.

She valued the suit at Rs. 600.

On the 1st January 1904, her suit was dismissed with costs. An

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the lower Courts and remanded the case for further enquiry. Amongst other matters this Court's decree directed the defendants to account to the plaintiff for all logs of timber received by them bearing the plaintiff's mark. The further enquiry was held and a commissioner was appointed to take the account. His conclusion was that there was due by the plaintiff to the defendants Rs. 615 with interest at 2 per cent. per mensem on Rs. 600 up to the date of institution of the suit. The District Court then passed judgment on the 6th February 1906, that upon plaintiff paying the defendants Rs. 615 together with the interest due on Rs. 600 at 2 per cent. per mensem from the date it was advanced up to the date of the institution of the suit, the defendants do deliver over to her the power-of-attorney granted by her to their manager and her hammer-mark certificate. She was not satisfied with this decree, and on the 21st May 1906 appealed to this Court. An objection was raised that the appeal was barred by limitation, but this Court decided that it was filed just within time and disallowed it. It was held to have been filed on the 90th day, and the period of limitation allowed is 90 days. An objection was then made that the appeal lay to the Divisional Court and not to this Court. This objection was allowed, and on the 20th June 1907 it was ordered that the memorandum of appeal be returned to the appellant to be presented to the Divisional Court. It was so presented on the 29th June. That Court held that the appeal was time-barred and dismissed it. Against that decision this appeal is now laid.

Two grounds are taken. The first is as follows. The decree of the District Court was passed on the 6th February 1906, and the appellant alleges that on the 10th February she took steps to obtain a copy of the decree by applying for the same before it was drawn up and signed, and that she was told that a decree was not necessary on the 21st February. It appears that the decree of the District Court was not signed till the 17th May. She therefore claims that in computing the period of limitation, the period from the 10th February to the 17th May 1906 should be excluded under section 12 of the Limitation Act. From the application and the affidavits filed the following appear to be the facts. On the 10th February she applied for a copy of the judgment and decree. The Head Copyist of the District Court was told that no decree was necessary, and so on the 21st February he gave Ma Thein Yin a copy of the judgment and returned to her the requisite stamps for the decree, telling her that a decree was not required. Ma Thein Yin says that she then believed that no decree was necessary and that she received back the stamps. She says that she did not think it necessary to consult any one on this point until she went to Rangoon and consulted Messrs. Burjorjee and Dantra. They told her that a copy of the decree was required, and so Mr. Dantra made an application for a copy of it on her behalf. This application was made on the 16th May and a copy was supplied on the 17th. By section 12 of the Limitation Act the time requisite for obtaining a copy of the decree is to be excluded. Ma Thein Yin made no application for a copy between the 21st February and the 16th May. Should this period be excluded as coming within the meaning of time requisite for

obtaining a copy? I am of opinion that it should not be. Every would-be appellant should take steps to prosecute his or her appeal with no unnecessary delay. If Ma Thein Yin had gone promptly to her counsel, she would have been told that a copy of the decree was necessary. In that case she might possibly have asked that the period between the 21st February and the making of the application might be excluded; but where nothing is done for nearly three months, I cannot hold that such a period was a period of time requisite for obtaining a copy. The application was certainly not pending after the 21st February as Ma Thein Yin accepted the word of the copyist and took back the stamps. The first ground I therefore decide in her disfavour.

The second ground taken is that she had sufficient ground for not presenting the appeal within the time allowed and so that the second paragraph of section 5 applies. She pleads that she is entitled under section 14 to exclude the time during which she was prosecuting the appeal in this Court, and that she was misled by her advocates in filing the appeal in this Court. Section 14 lays down that the party must be prosecuting the proceeding in the Court without jurisdiction in good faith, that is, with due care and attention. The law seems to me to have been clearly explained in the case of *Krishna v. Chathappan* (1) in which it was held as follows :—

The true rule is whether under the special circumstances of each case the appellant acted under an honest, though mistaken, belief formed with due care and attention. Section 14 of the Limitation Act indicates that the Legislature intended to show indulgence to a party acting *bonâ fide* under a mistake. We think that section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bonâ fides* is imputable to the appellant.

This case was quoted with approval in the recent case of *Sara Chander Bose v. Saraswati Debi* (2). As regards an appellant being misled by counsel, I agree with the view held by their Lordships in the case of *Kura Mal v. Ram Nath* (3) when they said :—

We have no hesitation in holding that when a client *bonâ fide* accepts the advice of counsel as to the proper procedure to adopt in the course of litigation, and, misled by that advice, failed to file an appeal in time, he is entitled to the benefit of section 5 of the Limitation Act and should not be visited with the serious penalty which is involved in the rejection of his appeal.

The essence of section 14 seems to be that the party—not counsel—must be prosecuting the action with due care and attention, and the point to be decided here is whether Ma Thein Yin had acted with due care and attention when she filed her appeal in the Chief Court. The burden of proof lies on her, and the material on which the point must be decided is the affidavits filed. Mr. Burjorjee does not say when Ma Thein Yin went to him, nor does she say. This is an unsatisfactory feature, and leaves open the question whether she went after the period for filing the appeal in the Divisional Court had expired.

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Mr. Burjorjee says : " I went over the papers placed before me carefully and I was of the opinion from such papers that the appeal lay to Hon'ble the Chief Court of Lower Burma, as the suit was one for redemption and the subject-matter of the suit over Rs. 5,000 in value. I had no personal knowledge of the previous litigation in the suit." It will be observed that he does not say what papers were placed before him, and that he says he had no personal knowledge of the previous litigation in the suit. It was the duty of Ma Thein Yin to place before him all the papers in the suit, and certainly to have advised him of the previous appeal to the Divisional Court and then from there to the Chief Court. If she did not do so, in my opinion she did not act with due care and attention. If Mr. Burjorjee had been in possession of this information, he might have advised her differently. His words are that he had no personal knowledge of the previous litigation in the suit. It is difficult to understand what he exactly means by these words ; but they may bear the meaning that Ma Thein Yin did not acquaint him with the course of the previous litigation, and if she did not, she has not in my opinion acted with due care and attention. The burden of proof lies on her and I must hold that she has not proved that she did act with due care and attention. I am unable therefore to allow her the benefit of section 14. I must therefore hold that her appeal to the Divisional Court was time-barred and dismiss the appeal with costs.

Criminal  
Revision  
s. 245B of  
1908.

September  
11th, 1908.

*Before Mr. Justice Irwin, C.S.I.; Officiating Chief Judge.*

KING-EMPEROR v. M. N. ATCHATARAMAYYA.

*Agabeg—for respondent.*

*Danger caused by disobedience of railway rules—Duty and responsibility of Station Master—Consequences of disobedience of rules—Collision—Indian Railways Act, 1890, s. 101.*

A, an Assistant Station Master, expecting the arrival of a down mail train in his station, instructed his jemadar to let it come into the station main line, and, after it had come in, to set the points at the up end of the station so as to allow an up goods train to proceed from a side line. At the time of issuing these instructions he gave the keys of the points to the jemadar, although the points were already set for the main line. The jemadar, without waiting for the mail to come in, set the points for the side line on which the goods train stood. On the approach of the mail, A allowed the signal to be given for it to enter the station without further satisfying himself, as required by the rules by which he was bound, that the points were correctly set. The mail in consequence ran on to the side line and collided with the goods train.

*Held*,—that A endangered the safety of many persons by his disobedience of the rules, and his conduct therefore brought him within the terms of section 101 (b) of the Act.

*King-Emperor v. A. C. Dass*, 4 L.B.R., 139, followed.

*Shankar Balkrishna v. King-Emperor*, (1904) 13 L.R. 32 Cal., 73, distinguished.

About 2-30 A.M. on 25th January 1908 a collision occurred at

Nyaungbintha station. The respondent was Assistant Station Master on duty at the time, and he was prosecuted under section 101 of the Railways Act, 1890. The Additional Magistrate, Toungoo, discharged him. Application was made to the District Magistrate to order further inquiry. The District Magistrate, while finding that the respondent did not do his duty, and that if he had done his duty the accident would not have occurred, yet considered that he was not criminally negligent within the meaning of the Act. The Local Government have therefore directed the present application for revision to be made to this Court.

There is no doubt about the facts of the case. There are three lines at Nyaungbintha. No. 1 is the platform line; No. 2 is the main line, on which a running-through train would ordinarily run. No. 186 down goods arrived on the platform line. Then No. 183 up goods arrived on the main line, and was moved ahead and was shunted back to the third line. Then No. 3 up mail passed through on the main line. On this particular night it would pass No. 4 down mail at the next station north, namely, Pyu. When No. 3 up mail had passed Nyaungbintha, No. 186 down goods was despatched to Kanyutkwin. No. 4 down mail was timed to run through Nyaungbintha, but line-clear to proceed to Kanyutkwin could not be given to it until No. 186 down goods reached Kanyutkwin. At this time the keys of the points were in the possession of the accused. No. 3 up mail had just passed; therefore it must be assumed that the northern points of lines 2 and 3 were set for the main line (2); the only alternative is that 3 up mail must have burst the trailing points. If the points had not been burst they were correctly set to let No. 4 down mail pass, and no alteration in any points ought to have been made until after No. 4 down mail had passed. This being so, the accused called the jemadar, gave him the keys of the northern points, and told him that No. 4 down mail was to come in on the main line and stop, and after it had come in, he was to set the trailing points to let No. 183 up goods proceed to Pyu. The jemadar, without waiting for the down mail to come in, set the points for the third line. Then the down mail whistled; the jemadar called for the signal; the accused came out of the office, let down the home signal, and under his orders the porter let down the distant signal; the down mail came in on the third line and collided with No. 183 up goods.

Of the rules framed by the Government of India under section 47 of the Act, and which came into force on 1st January 1907, rule 247 throws on the accused the responsibility for ensuring that all points are correctly set, and all facing points securely locked, for the passage of trains. Subsidiary rule (f) (iii) runs thus:—

In the case of running-through trains or trains timed to run through, the Station Master shall inspect and is personally responsible that all facing points over which the train will pass are correctly set and locked.

Subsidiary rule (j) (i) under the same rule contains the following directions:—

If a train which is booked to run through has to be stopped for any cause

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at danger.....Engine drivers of trains that are booked to run through shall, when they have been stopped outside signals and are subsequently admitted into the station yard, be prepared to stop there if an authority to proceed is not received at the outermost points.

The accused disobeyed subsidiary rule (f) (iii) by omitting to inspect the points before ordering the signal to be lowered. That brings him within the terms of clause (b) of section 101. His culpability is greatly increased by the fact that he gave the keys to the jemadar before the down mail came, as he knew that they would not be required until after that train had passed.

The accused said that he saw the down mail stop at the outer signal. He is contradicted in this by the driver, and is not supported by any witness. In case of any further proceedings being taken it would be necessary to inquire further into this, as no notice was taken of it by the Magistrate. If the train did not stop at the outer signal, the accused disobeyed subsidiary rule (j) (i) by ordering the porter to lower the signal.

The Additional Magistrate held that the accused was not guilty of negligence, and that it was not proved that he had endangered the life of any person. Neither of these questions was strictly in issue. The questions were whether he disobeyed a rule which he was bound to obey, and whether he thereby endangered the safety (not necessarily the life) of any person. It is proved up to the hilt that he disobeyed a rule which he was bound to obey, and I do not think the Magistrate could have arrived at the conclusion that he had not endangered the safety of any person if he had read the report of *King-Emperor v. A. C. Dass* (1). It is quite obvious that his disobedience of rule, by making it possible for the jemadar to switch the train on to the third line, very greatly endangered the safety of many persons on the mail train and of the driver and fireman of the goods train. The case of *Shankar Balkrishna v. King Emperor* (2) was relied on by the accused. It is in no way parallel to the present case. This disobedience was of a very different kind, and the consequences altogether unexpected.

The District Magistrate came to no finding on the points really in issue.

The learned Government Advocate did not press for further action against the accused, as he has been under suspension for several months. What is desired by the prosecution is an emphatic pronouncement by this Court that disobedience of rules such as is proved in this case is punishable by imprisonment. Such a pronouncement, it is believed, will be more effectual than many departmental punishments in preventing future disobedience. The ruling in *Dass's* case which I cited above ought to be sufficient warning to railway servants and guide to Magistrates, but probably it had not been published when the District Magistrate dealt with the present case. For that reason I abstain from making any order for further inquiry into the case.

(1) 4 L.B.R., 139.

(2) (1904) I.L.R., 32 Cal., 73.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR v. PO GYI.

Young—Government Advocate.

D. M. Karaka—for respondent.

*Danger caused by disobedience of railway rules—Duty and responsibility of Station Master—Consequences of disobedience of rules—Indian Railways Act, 1890, s. 101.*

Criminal  
Appeal  
No. 530 of  
1908.

December  
14th, 1908.

A, an Assistant Station Master at Pyuntaza, having ascertained that the line was clear to Daiku, the next station, gave the ticket conveying authority to proceed to the guard of a down train, which was then waiting at his station. He then received a message from Daiku asking him to withdraw the ticket, in order to allow an up train to proceed from Daiku to Pyuntaza. In contravention of the rules by which he was bound, he at once signalled to Daiku that the line was clear, without first getting back the ticket from the guard. On going out to get the ticket, he found that the down train had started. The result was that the two trains met between the stations, although the drivers were able to stop in time to avoid a collision.

Being prosecuted under section 101 of the Railways Act for endangering the safety of persons by disobedience of rules, A pleaded that he told the guard of the down train not to start without telling him.

*Held*,—that although, if the guard started without A's verbal permission, he also contravened a rule, A's disobedience of rule in connection with the written ticket was the more serious, and was the principal cause of the danger that ensued. A was convicted under section 101, and was sentenced to a term of imprisonment.

*Shanker Balkrishna v. King-Emperor*, (1904 I.L.R. 32 Cal.) 73, distinguished.

The accused, who was Assistant Station Master on duty at Pyuntaza station, received intimation from Daiku that the line was clear for No. 180 down goods, and he then prepared the line-clear ticket or "authority to proceed," and handed it to the guard of No. 180 down goods. Shortly afterwards Daiku asked him to cancel the line-clear he had received, and allow No. 89 up to take precedence. He did so at once, without taking back the line-clear ticket he had given to the guard, and he gave line-clear to Daiku for the No. 89 up to come. Then he went out to look for the guard, and found that the No. 180 down had started. The two trains met on the single line about half way between the two stations, but fortunately each driver saw the lights of the other train in time to avert a collision.

The act of giving the line-clear for the No. 89 up without first getting back the line-clear which he had given to the guard of No. 180 down was a flagrant disobedience of rule 19 of Chapter III of the Regulations for signalling trains. Accused was charged under section 101 of the Railways Act, 1890, with endangering the safety of the persons on both trains by this disobedience of the rule. His defence was that he told the guard not to start without first telling him. Rule 269 of the general rules prohibits a guard from starting his train until he receives permission from the Station Master. Such permission is given orally, and is a separate matter from the written line-clear ticket.

The Magistrate held it not proved that the accused gave the guard permission to start, and therefore he found that the responsibility for the accident lay on the guard, and not on the accused, as his act seemed to the Magistrate to entail no danger, and appeared to be too remote a cause for the incident which had happened. He was guided by the ruling in the

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case of *Shanker Balkrishna v. King-Emperor* (1), in which a Station Master wrote a line-clear message which he had not in point of fact received, left it unfinished on his table in the book, and the guard came in and took it away without permission, and acted on it. Assuming that that decision is correct, it is no authority for deciding the present case, as the facts are entirely different. The guard's act in taking the ticket without leave out of the book was held to be an extraordinary one, and entirely unexpected. It does not require much knowledge of human nature to know that when a guard of an empty train is given a proper line-clear ticket nobody need be much surprised if he starts without any further permission. The giving of oral permission is such an informal matter, and so difficult to prove or disprove, that it is certain to be regarded by railway servants in general as a thing of very small consequence compared to the written line-clear. As a mere matter of common sense I must regard the accused's disobedience of rule 19 as an intensely dangerous act. It was the principal cause of the two trains meeting on a single line. If the guard started without further oral permission, that was a minor cause, and contributed in a much smaller degree to the danger which ensued. Whether the guard is to blame for the danger to life or not is quite irrelevant in the present case. The chief blame must rest on Maung Po Gyi, for giving line-clear for the up train while a line-clear ticket for the down train was in the possession of the guard of the down train.

I therefore set aside the acquittal of Maung Po Gyi, and I convict him of endangering the safety of many persons by disobeying a rule which he was bound to obey, an offence under section 101 of the Railways Act, 1890, and I sentence him to one month's rigorous imprisonment; a lighter sentence than I think the Magistrate ought to have passed.

### Full Bench—(Criminal Revision).

*Criminal Revision*  
 No. 214B of  
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 —  
 September  
 7th,  
 1908.  
 —

Before Mr. Justice Irwin, C.S.I., Officiating Chief Judge,  
 Mr. Justice Hartnoll, and Mr. Justice Ormond.

BA THAW v. KING-EMPEROR.

M. Auzim—for applicant.

Dawson—Assistant Government Advocate.

*Appealable sentence*—Appeal from first class Magistrate—Right of appeal of accused convicted at joint trial—Meaning of 'case'—Criminal Procedure Code, ss. 408, 413.

If, at the joint trial of two more persons by a first class Magistrate, an appealable sentence is passed upon any one of them, all those convicted have the same right of appeal even though their sentences may be of the kind against which appeal would have been barred by section 413 of the Code of Criminal Procedure, if they had been tried singly.

*Reg. v. Kalubhia Meghabhai and others* (1870) 7 Bom. H.C.R., Cr., 35 dissented from.

*Irwin Officiating Chief Judge.*—Ba Thaw and two others were tried at one trial by the Subdivisional Magistrate of Ngathainggyaung. The other two were imprisoned and fined; Ba Thaw was fined



Rs. 50 and ordered to give security to keep the peace. All three appealed jointly to the Court of Session. Ba Thaw's appeal was rejected on the ground that no appeal lies; the appeal of the other two was heard. Ba Thaw applied to the Court of Session for revision, and the Sessions Judge has referred the case to this Court with a recommendation that the conviction be set aside on the ground that the conviction was largely based on the Magistrate's recollection of something that one of the other accused had said to him before the trial.

The learned Judge's order rejecting Ba Thaw's appeal is of course based on section 413 of the Code of Criminal Procedure, and he has construed that section in the sense in which I believe it has been construed in this province from the earliest times. I think that construction is wrong, but I should not venture to question it after it has prevailed for so many years were it not that a contrary construction would not only be to the advantage of convicted persons, but would also tend to facilitate the despatch of business in criminal Courts.

Under section 408 any person convicted by a Magistrate of the first class may appeal to the Court of Session, and Ba Thaw therefore has a right of appeal unless it is taken away by section 413, which runs thus :—

Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only.

Substantially the same terms were used in the Codes of 1882 and 1872. In the Code of 1861 the corresponding section was slightly different, *viz.* :—

In all cases in which a . . . . . Magistrate shall pass a sentence of imprisonment not exceeding one month or of a fine not exceeding fifty rupees, no appeal shall be allowed.

The question is this, when two or more persons are tried jointly and one of them is sentenced to a fine of Rs. 50 only, and another to some punishment which gives him a right of appeal, is the right of appeal of the person who was sentenced to a small fine only taken away by section 413?

It does not appear that there have been any rulings on the point since the Code of 1872 came into force. Aiyar's Code gives references to three rulings under the Code of 1861, all denying the right of appeal, but I have been able to find only one of these, *viz.*, *Reg. v. Kalubhai Meghabhai and others* (1), in which the Sessions Judge gave strong and cogent reasons for entertaining a joint appeal of eight persons who had been convicted, including three who had been fined only Rs. 50 each, and reduced all the fines to Rs. 20 per man. The District Magistrate reported the case, and the High Court, without giving any reasons whatever, annulled the order of the Sessions Judge and restored the sentences on the three men who had been fined only Rs. 50 each. With all respect I am unable to attach great weight to that ruling.

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The true solution of the question seems to depend on the meaning of the word "cases" in section 413. In the first place I think it is obvious that grammatically it ought to be "a case" in order to harmonize with the rest of sentence. Secondly the word "case" is used in the Code in at least three different senses, but in the definitions of "cognizable case," "summons case," and "warrant case," in Chapters XVIII, XX and XXI, and in sections 346 to 350, both included, the word is used to denote a proceeding relating to an offence in which any number of persons may be dealt with. This, I think, is the most reasonable construction to put upon the word in section 413.

Then, if "case" includes a trial at which two or more persons are convicted, the grammatical meaning of the section, to my mind, is that there shall be no appeal in a case in which no sentence exceeding any those described in the section is passed on any of the persons convicted. This is consonant with common sense. When the whole case is trivial, finality is of more importance than the correction of possible mistakes; but if a substantial sentence is passed on one person the case is not trivial, and it is obviously expedient that the Appellate Court should have jurisdiction to deal with the whole case if all the persons convicted choose to appeal. If the contrary had been the intention of the Legislature, the obvious way to express it beyond the possibility of a doubt would have been to substitute for "in cases in which" the words "on whom."

If there be any room for reasonable doubt about the meaning of the section, the benefit of the doubt should be given to the person who desires to appeal.

For these reasons I think that when more persons than one are convicted at one trial, and an appealable sentence is passed on any one of them, section 413 does not take away from the other convicts the right conferred by section 408, namely, "Any person convicted on a trial held by . . . a . . . Magistrate of the first class may appeal."

I would therefore set aside the order rejecting the appeal of Ba Thaw, and direct the Court of Session to hear the appeal.

Hartnoll, J.—I concur.

Ormond, J.—I concur.

Before Mr. Justice Hartnoll.

RANGANAYAGIAMAL AND ANOTHER v. MAHALI PILLAY AND  
RATNASABAPATHI MUDALIAR.

D. M. Karaka—for applicants. | D. N. Palit—for respondents.

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revision  
110 of  
908.

September  
, 1908.

Power of Court to cancel appointment of Receiver—Refusal to hand over property to Receiver—Inquiry regarding property to be handed over to Receiver—Enforcement of order of Receiver—Temporary injunction—Civil Procedure Code, ss. 108, 492, 493, 503.

A Court which has passed an order appointing a Receiver in any case has power subsequently to hold an inquiry as to whether the order should remain in force or not, and if necessary to cancel the order.

Where a Receiver has been appointed and any person refuses to hand over property to him, the proper course is for the Court to hold an inquiry as to the

possession of the property in question, and as to whether it is property that should be handed over to the Receiver, before issuing an injunction under section 492, Code of Civil Procedure, unless it appears that the object of the injunction would be defeated by the delay.

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LAY.

The applicants sued the respondents for the recovery of certain property said to belong to deceased R. M. D. Dorasawmy Pillay as his heirs. The property is stated to consist of immoveable and moveable property amounting in value to some Rs. 70,000. They asked that a Receiver be appointed pending the litigation. On the 12th June last the Judge of the District Court appointed *ex-parte* the bailiff of his Court as Receiver. This order was passed under section 503 of the Code of Civil Procedure. On the 18th June the bailiff reported that the respondent Mahali would not hand him over possession of the property, and on application of the plaintiffs' agent the Judge issued notice on Mahali to show cause why he should not be committed for contempt. On the 2nd July Mr. Home appeared for Mahali to show cause. The Judge directed that an order issued to Mahali directing him to hand over the property in dispute to the Receiver on or before the 9th July, failing which he would be dealt with under section 493 of the Code of Civil Procedure. On the 9th July the bailiff reported that Mahali still refused to hand over the property to him, and on the same date the respondents filed an application asking that as no application had been made for an injunction, and as no notice of any application for an injunction had been served on any of the defendants, the order of the 2nd July should be set aside. The application went on to say that there was nothing to show for what properties the Receiver had been appointed, and that the respondents had not got any of the separate properties of the deceased in their possession. It also said that the respondents were about to apply for a review of the order appointing a Receiver, but could not do so as there had been a change of Judges, and were about to appeal against the order appointing a Receiver. They therefore asked that the order of the 2nd July be set aside and the order appointing a Receiver be stayed. Subsequently on the 1st August they put in another application stating that they have been advised that unless an application for the cancellation of the order appointing a Receiver be made the Chief Court would not entertain their appeal, so they asked that the order appointing a Receiver be set aside under section 108 of the Code of Civil Procedure, and that the application be reheard.

On the 8th August, the Judge passed orders refusing to interfere with the order of the 2nd July, found that he could not commit the respondents to jail if they refused to hand over the property to the Receiver, and that he could not stay the order appointing the Receiver. He held that the respondents should apply to the Court of appeal, or under section 102 of the Code of Civil Procedure. I conclude the Judge meant section 108. On the 10th August the Judge noted that he was not prepared to hold that the application of the 1st August was time-barred, and directed respondents to file affidavits in answer to those filed by the other side. He also removed the bailiff from the Receivership as he considered that it was not advisable that he should

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act as a Receiver of a Tamil estate, and said that the plaintiff should nominate some one else. This application is now filed asking that the order removing the bailiff from the Receivership be set aside and that the Receiver be directed to take possession of the property forthwith, that the order of the lower Court admitting the application under section 108 be reversed, and that the respondent be committed for contempt of Court for persistent refusal to deliver over possession to the Receiver.

As regards the order removing the Receiver, I am not prepared to interfere with it. The property is valued at some Rs. 70,000. The bailiff of the Court has only given security to Government to a small extent as compared with Rs. 70,000. The Receiver to such a property should give good security in the first instance. Secondly, the bailiff is an officer who has plenty to do, and to administer the property of such value might unduly interfere with the performance of his other duties. The plaintiffs should nominate some one else who should furnish due security, and the respondents should receive notice before he is appointed, so that any objections they have to make may be considered.

With regard to the second prayer, that the order admitting the application under section 108 should be reversed, it would seem that the power of the removal of a Receiver is inherent in the Court. At page 269 of Woodroffes's Law relating to Receivers, it is written :—

The power to terminate flows naturally and as a necessary sequence from the power to create. The power of the Court to remove or discharge a receiver whom it has appointed may be exercised at any stage of the litigation. It is a necessary adjunct of the power of appointment and is exercised as an incident to, or consequence of, that power; the authority to call such officer into being necessarily implying the authority to terminate his functions when their exercise is no longer necessary, or to remove the incumbent for an abuse of those functions or for other cause shown.

And again at page 283—

A Court of Equity, as of course, is always ready to rectify improper or irregular proceedings, and where an application for a receiver has been allowed and it subsequently appears that the appointment was improper, the receiver will be discharged . . . . Inasmuch as the receiver is appointed upon the theory that thereby the interests of all the parties concerned will be the better subserved, protected and secured, it follows, as of course, that whenever at any stage of the litigation subsequent to the appointment these interests will be promoted by the discharge of the Receiver, it is the proper practice to move therefor.

I see no reason to dissent from these views, and that being so, in the exercise of the power inherent in the Court it seems to me that at any time it can hold such enquiry as it may deem fit, as to whether it may be still fit and proper for the order for the appointment of a Receiver to remain in force, or whether it should be cancelled. I accordingly hold that in the present case it is in the power of the Judge, and indeed proper for him so to do, as the Receiver was appointed *ex-parte*, to hold an enquiry as to whether the order of appointing a Receiver should remain in force or not. The matter seems to me quite outside the consideration as to whether the order of appointment

comes within the meaning of the word "decree" as used in section 108 of the Code of Civil Procedure.

With regard to the third prayer in the plaint, it seems to me that when a Receiver is appointed and when any person refuses to hand over to him certain property, an enquiry should ordinarily be held as to whether the property, which should be specified, is property that should be handed over to the Receiver and property that is in the possession of the person alleged to be in possession of it. Under section 494 of the Code, notice of the application should be given to the person concerned, and then after such enquiry as may be necessary an injunction can be issued under section 492 ordering the property, which should be specified, to be handed over to the Receiver. Disobedience to that injunction can then be enforced under the third paragraph of section 493. The only case in which such enquiry should not be held is where it appears that the object of granting the injunction would be defeated by the delay. The present case would not seem, as it at present stands, to come within this category. If therefore in the present case the Judge after such enquiry as may be fit finds that the order for the appointment of a Receiver should still remain in force, and appoints another Receiver, he can then proceed to the consideration as to whether a temporary injunction should issue under section 492 and be enforced, if necessary, under the third paragraph of section 493.

With these remarks the proceedings can be returned. I pass no order as to costs.

*Before Mr. Justice Irwin, C.S.I.*

KATHAN AND KARPANA *v.* KING-EMPEROR.

*DeGlanville*—for appellants.

*Dawson*—Assistant Government Advocate.

*Appealable sentence in summary trial—Order for security for good behaviour, in addition to sentence of imprisonment—Rangoon Police Act, ss. 30, 31A—Criminal Procedure Code, ss. 408, 414, 415.*

A was tried at a summary trial under section 30 of the Rangoon Police Act and was sentenced to three months' rigorous imprisonment and further ordered to give security for good behaviour under section 31A.

*Held*,—that the addition of the order for security rendered the case appealable.

*King-Emperor v. Po Thin*, 2 L.B.R., 72; *Ba Thaw v. King-Emperor*, 4 L.B.R., 354; referred to.

Kathan and Karpana were tried at a summary trial by the District Magistrate of Rangoon, under section 30 of the Rangoon Police Act, and were both convicted. Kathan was sentenced to suffer three months' rigorous imprisonment and was further ordered under section 31A to execute a bond for Rs. 100 with two sureties, for his good behaviour for one year, and in default to suffer one year's rigorous imprisonment. Karpana was sentenced to suffer one month's rigorous imprisonment.

Kathan has appealed and the question arises whether an appeal lies. As he was convicted on a trial held by a District Magistrate, he

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*Criminal  
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has a right of appeal under section 408, Criminal Procedure Code, unless that right is specially taken away by any other section. Section 414 takes away the right of appeal in any case in which a Magistrate empowered to act under section 260 passes a sentence of imprisonment not exceeding three months only; and section 415 explains that no sentence which would not otherwise be appealable shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace. These two sections must be read together. If section 414 stood alone it might perhaps be fairly argued that an order to give security, with the alternative of imprisonment, is not a "sentence" nor part of a sentence. In *King-Emperor v. Nga Po Thin* (1), it was held by the majority of a full bench that an order of imprisonment for failure to give security for good behaviour is not a sentence within the meaning of sections 396 and 397 of the Code of Criminal Procedure. That decision was in favour of the subject, and I do not think it is binding on me in construing the meaning of a different section, where a like decision would curtail the right of appeal, and where the construction does not depend on the meaning of the word "sentence" alone, but depends largely on the following section also.

An order to give security for good behaviour, as a corollary to a conviction for an offence, is not contemplated in either the Penal Code or the Code of Criminal Procedure. It is the creation of a local Act. It is contended on behalf of the Crown that the provision in section 415 which I have quoted, namely, that the edition of an order to give security to keep the peace does not render a sentence appealable, should be extended by analogy to an order under the Rangoon Police Act to give security for good behaviour. I cannot agree with that. The local Act having given the Magistrate authority to pass an order not contemplated by the Code, I think analogy cannot take away the general right of appeal conferred by section 408. The terms of section 415 indicate that apart from that section it would be at least doubtful whether there was not a right of appeal in case of a sentence of imprisonment for one month combined with an order to give security to keep the peace, and the benefit of the doubt would be given to the would-be appellant. As section 415 contains no reference to security for good behaviour, and there is no corresponding provision in the Rangoon Police Act restricting the right of appeal, I must hold that the right of appeal conferred by section 408 is not restricted.

I have not overlooked the fact that there is no appeal from an order of a District Magistrate requiring security for good behaviour. Section 406 refers to cases in which there is no conviction for an offence, and it cannot affect the present case which is governed by section 408.

I therefore find that Kathan has a right to appeal.

Karpana presented a petition for revision; but since he did so a full bench of this Court has decided in the case of *Ba Thaw v. King-Emperor* (2) that when more persons than one are convicted at one

(1) 2 L.B.R., 72.

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(2) 4 L.B.R., 354.

trial, and an appealable sentence is passed on any of them, all the persons convicted at such trial have a right of appeal. Karpana's petition will therefore be treated as an appeal.

The District Magistrate evidently thought that his orders would not be appealable; the record he made would be quite suitable under section 263, but it does not embody the substance of the evidence as required by section 264. I therefore set aside the convictions and sentences, and direct that the accused be retried.

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Before Mr. Justice Hartnoll.

ENG KEAT v. THE BURMA RAILWAYS COMPANY, LIMITED.

Lambert—for applicant (plaintiff). Higinbotham—for respondents (defendants).

*Practice of High Court in Civil Revision—Delay in applying for revision in civil case—Dismissal of application for revision—Provincial Small Cause Courts Act, s. 25.*

Civil  
Revision  
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An application to set aside a decree of a Court of Small Causes, under section 25 of the Provincial Small Cause Courts Act, may be dismissed on the ground of delay in presenting it even after it has been admitted in the High Court.

This is an application made under section 25 of the Provincial Small Cause Courts Act to set aside a decree of the Small Cause Court dismissing applicant's suit. The suit was dismissed on the 11th October 1907, and this application was not made till the 27th April last. Great delay therefore occurred in making it, and it is urged that the application should be dismissed on that ground alone. Mr. Lambert contended that because it had been once admitted it was now too late to urge such a plea. I am unable to concur in this view. When the application was admitted the other side had not had the opportunity of bringing the delay to notice. It certainly seems to me that inordinate delay can be brought to notice at the hearing, and that the Court can be asked not to interfere in consequence. From the explanation given by Mr. Lambert there appear to be no good reasons for the delay that occurred. The applicant does not seem to have prosecuted his application with due diligence. On this ground alone I think that there is sufficient reason for rejecting the application.

But on the merits I see no reason for any interference. The only point for decision is whether the Railway Company proved the loss of the 20 bags of chillies, and whether there is evidence sufficient to come to a conclusion on the point. I am of opinion that there was. The wagon is shown to have been sealed in Myittha, and to have had its seals broken and a false seal put on on the way. Search was made for the bags and they have not been found. As long as the Railway Company proves the loss, that seems to me to be sufficient. I do not consider that it should be incumbent on the company to prove the exact details of the loss in each case. This would be impossible in many cases of theft and misappropriation. The case differs from Civil Revision No. 147 of 1907 of this Court. In that case it was held that there was no evidence of loss.

The application is dismissed with costs.



Criminal  
Appeal  
No. 646 of  
1908.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Irwin, C.S.I.

AUNG MIN v. KING-EMPEROR.

Dawson, Assistant Government Advocate—for the King-Emperor.

Remember  
h, 1908.

*Evidence of discharged co-accused—Admissibility of evidence—Competent witness—  
Discharged accomplice—Discharge of accused without recording reasons—  
Indian Evidence Act, 1872, ss. 118, 132, 133, 146.*

A and B were sent up for trial together by the police on a charge of murder. The Magistrate discharged A before recording any evidence and without recording any reasons, and subsequently examined him as a witness. It had been argued that the omission to record reasons rendered the discharge illegal, and that consequently A's evidence was inadmissible.

*Held*,—that whether A's discharge was or was not illegal, his evidence was admissible, but not worthy of credit.

*Empress v. Durant*, (1898), I.L.R. 23 Bom., 213, followed.

*Banu Singh v. King-Emperor*, (1906) I.L.R. 33 Cal., 1353, referred to.

*Irwin, J.*—The facts which are proved and not disputed are that late on the afternoon of 10th July 1908 Shwe Do started from Ma Hnin's house in Talokkon to return to his house in Shadaw. At that time Aung Min, Po Thin, Myat Pwa and other persons were drinking *tari* at a *tari* tree near Ma Hnin's house. Po Thin had a *da*, which was then stuck in the ground; Myat Pwa had a *dagok*. Po Thin had left some unfinished harrow teeth somewhere in the fields, and he called Aung Min to go with him to fetch them, and before starting he took the *dagok* out of Myat Pwa's hand. Aung Min took Po Thin's *da*, and they went together, following the path Shwe Do had taken. Soon afterwards Myat Pwa, Shwe Byi, Po Kin and Nga Net started to return home to Seywa *viā* Ywathitkon. Just before they reached Ywathitkon, Aung Min and Po Thin came fast across the fields and joined them. Po Thin had no *da* then. Aung Min was carrying Myat Pwa's *dagok*, and returned it to him then and there. Aung Min speaking in a low voice made some statement to Myat Pwa and Po Kin about Shwe Do having been wounded. About 8 o'clock the same evening Aung Min went to the Seywa headman, Maung San Dun, and reported to him that Po Thin had cut Shwe Do. Po Thin was then arrested, and Aung Min pointed out Shwe Do's dead body. After that, Po Thin said it was not he, but Aung Min, who had killed Shwe Do.

The police sent up both Po Thin and Aung Min for trial. The Subdivisional Magistrate, before recording any evidence, discharged Po Thin, and examined him as a witness against Aung Min. In the Court of Session it was objected that the discharge was illegal and Po Thin's evidence was therefore inadmissible. The learned Judge did not decide the point, but put Po Thin's evidence out of consideration as altogether untrustworthy. That is the course which was taken in the case of *Banu Singh v. King-Emperor* (1), in which an accused person, though not discharged, was not being tried in the particular trial in which he was examined as a witness. I entirely agree with the learned Sessions Judge that Po Thin's evidence is worthless, but I do

(1) (1906) I.L.R. 33 Cal., 1353.

not think that the question of law should be left undecided. Questions of admissibility of evidence in a criminal trial must, in my opinion, be decided solely by reference to the Evidence Act, unless the Code of Criminal Procedure or any other enactment contains a distinct and specific direction on the point. There is no such direction on the point now in question. Under section 118 of the Evidence Act all persons are competent to testify unless the Court considers that they are prevented by certain causes from understanding the questions put to them, or from giving rational answers. Under section 133 an accomplice is a competent witness. There is no limitation whatever in respect of the witness being himself liable to prosecution for the same offence. On the contrary, sections 132 and 146 seem to imply that a witness who is in such a predicament is a competent witness.

It is said that the discharge of Po Thin was illegal. The order on the record is this: "Case received. Preliminary inquiry held at Mayangyo and 1st accused Po Thin discharged." There is nothing to indicate the nature of the preliminary inquiry. It must have been very brief, as after Po Thin's discharge 20 witnesses were examined the same day. In his reasons for committing Aung Min, the Magistrate gave some reasons for not charging Po Thin, but they are based on a conclusion to which the Magistrate could not properly come before he had examined the witnesses. The Magistrate certainly had power to discharge the accused Po Thin as he did, but he should have then and there recorded his reasons for so doing—section 200 (2) of the Code of Criminal Procedure. I find it difficult to say that the omission to record reasons makes the order of discharge illegal.

But in any case I do not think such a defect would make the evidence inadmissible. I agree with the view taken by Mr. Justice Candy in *Empress v. Durant* (2) that even a person who has not been discharged, but is about to be tried subsequently for the same offence, is a competent witness.

I think the Magistrate made a grave mistake in discharging Po Thin. I should prefer if possible to avoid discussing the question of Po Thin's guilt or innocence, but it cannot be avoided. On the proved facts there are three theories possible. Shwe Do was killed by Po Thin or by Aung Min, or by both jointly. Aung Min's appeal cannot be properly disposed of without considering all these three theories. On the evidence it seems to me that there is little to choose between the case against Po Thin and that against Aung Min, and both ought to have been committed for trial.

No motive for the crime is proved. No adequate motive is even suggested. Much the most probable theory is that both were concerned in the murder. I agree with the Sessions Judge that if there were only one wound it would be impossible to say which was the murderer, but there was no less than 9 wounds. They may have been all inflicted by one person, but it is more probable that both joined in.

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Myat Pwa is appellant's cousin-in-law, and is not related to Po Thin. His evidence that appellant asked him to hide the *dagok* is entitled to much weight, and there is no doubt that he at first did try to shield Aung Min by not producing the *dagok*. Appellant admitted that he was carrying this *da* after the crime. In his appeal he changes his ground and says that Po Thin returned the *da* to Myat Pwa.

Po Thin's *da* being broken, there can be little or no doubt that it was used in the murder. Appellant says that before they overtook Shwe Do he and Po Thin exchanged *das*. This is very probable, and if appellant had said no more about the *dagokma* there might have been much difficulty in holding that it was used in the murder. But appellant volunteered the statement that Po Thin snatched it from him to finish off Shwe Do, and then compelled him to carry it. This latter part of the story is incredible, but in view of the whole statement I think there is no room for reasonable doubt that both *das* were used, probably one by each of the men.

I think the evidence of statements made by appellant and Po Thin is of little value, except perhaps Myat Pwa's evidence, for he deposes that from the very beginning appellant gave him to understand that he and Po Thin were jointly responsible for the murder, and Myat Pwa, as I have said, is appellant's cousin-in-law.

The Sessions Judge improperly allowed the headman to relate statements made to him by Po Thin. Maung Pyu's evidence about Maung Myat Pwa saying that Aung Min wanted the *da* to be hidden was also improperly elicited.

The fact of Aung Min having reported the murder to the headman weighs with me more than it did with the Sessions Judge. With reference to the fact that he did not publish the matter before he saw the headman Po Kin's evidence deserves some consideration. Po Kin is related by marriage to both appellant and Po Thin. He differs from Myat Pwa in saying that from the first Aung Min accused Po Thin and did not say that he himself was implicated. He says, "I told Aung Min not to speak there but to tell the headman." He goes on to say that Aung Min told both his wife and Maung Po Lwin, and to both he said that he wanted to go to the police station. Po Lwin told him to go to the headman. He seems to have gone to the headman with very little delay, and Po Kin went with him. I cannot avoid the conclusion that at any rate from the moment when Aung Min and Po Thin joined the other men near Ywathitkon, Aung Min had formed the intention of reporting the crime without delay to the proper authorities, and that Po Thin on the contrary kept silence completely. The question then arises, can Aung Min's intention be ascribed to innocence, or merely to a desire to save himself at the expense of his accomplice in the murder? In his desire to fix the guilt on Po Thin he has certainly told a lie about Po Thin dropping the *dagok* into the well. On the whole of the evidence I think the probability is very strong that Aung Min was himself concerned in the murder and used the *dagokma*, and in fact the only point on which there is room for reasonable doubt is the exact nature of the share he had in the crime. That he had some share in it is proved by his

possession of the *da* afterwards, by his own statement that both *das* were used, by his returning from the murder in company with Po Thin, by the evidence of Myat Pwa as to his statements and by his asking Myat Pwa to hide the *dagok*.

I would therefore confirm the conviction, but in view of the uncertainty as to the exact part taken by Aung Min in the crime, I would alter the sentence to transportation for life.

*Fox, C.J.*—After consideration of the latest authorities bearing on the matter, I accept my learned colleague's views as to the competency of Po Thin as a witness, and as to the admissibility of his evidence. That evidence, however, is obviously valueless, and the Sessions Judge rightly discarded it.

As to whether the remaining evidence is sufficient for upholding the conviction of Aung Min, I am of opinion that it is. Although he told one of the first persons he came across after the commission of the crime that Po Thin had cut Shwe Do, his conduct after the crime, even if his own statement is true, was not that which might be expected of a wholly guiltless man who had witnessed a foul murder committed before his eyes. According to his own statement both of the *das* were used in the commission of the crime. One—Po Thin's—which he (Aung Min) set out with—was broken at the scene of crime, and the other which Po Thin had set out with was in Aung Min's hand when the two were next seen by any of the witnesses. The story which Aung Min gives by way of accounting for his possession of this *da* is so dubious as to be incredible. His remaining in Po Thin's company after the commission of the crime is not the natural conduct of a horror-stricken and frightened spectator, as he would have it believed that he was. His attempt to have the *da* hidden, and his admissions to Myat Pwa point also to his having taken some part in the crime. Taking the whole of the circumstances together, I think that the inference is justifiable that he did take some part in the crime, but what that part was, it is impossible to say.

Under the circumstances I agree that the conviction should be confirmed, but that the sentence should be reduced to one of transportation for life.

*Before Sir Charles Fox, Chief Judge, and Mr. Justice Irwint C.S.I*

A.L.M.S. SUBRAMONIEN CHETTY *v.* GANGAYA

*A. D. Nariman*—for appellant (plaintiff).

*Nicol*—for respondent (defendant).

*Agreement to accept portion of debt in full satisfaction—Substitution of new contract—Novation—Indian Contract Act, ss, 62, 63.*

A owed B Rs. 10,600, part of which sum was secured by two mortgages. B agreed to accept, in full satisfaction of all his claims, Rs. 7,500, if paid by a certain date, or in default of such payment a transfer by registered conveyance of the mortgaged property and certain other property which had been attached by B. The Rs. 7,500 was not paid by the date specified, but was offered shortly after. B, however, then refused it and demanded the property, which A refused to transfer to him.

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Civil 1st  
Appeal  
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November  
30th,  
1908.

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L.M.S.  
SUBRA-  
SONIEN  
HETTY  
v.

ANGAYA.

*Held*,—that if the Rs. 7,500 had been paid by the date specified, or if the property had been transferred as agreed upon, B's rights under the original mortgages would have been extinguished under section 63 of the Contract Act; but that as B did not accept, in exchange for his rights under the mortgages, a bare promise to pay the Rs. 7,500 or to transfer the property, section 62 did not apply and A's failure to pay the Rs. 7,500 in time and his refusal to transfer the property left the mortgages in full force.

*Manohur Koyal v. Thakur Das Naskar*, (1888) I.L.R. 15 Cal., 319, referred to.

*Irwin, J.*—The plaintiff-appellant sued the respondent Gangaya for Rs. 7,827-13-0 and a mortgage decree on two mortgages of land executed by respondent and his son Suppaya since deceased.

Defendant pleaded that plaintiff had sued him on another account for a sum of about Rs. 1,300 in suit No. 35 of 1906 of the Subdivisional Court of Pyapôn, and had arrested him before judgment, that while he was under arrest plaintiff had agreed to accept Rs. 7,500 in full satisfaction of all his claims, that after his release defendant tendered this amount, but plaintiff refused to accept it and said he wanted defendant's lands, which defendant refused to give, that defendant was ready and willing to pay the Rs. 7,500 and that as the original contracts were altered he was not bound to perform them.

The agreement to accept Rs. 7,500 is in writing, and is dated 25th April 1906-1268 Kasôn waxing 4th. It sets out that Rs. 10,600 were due, that Rs. 7,500 were to be paid by 1268 Kasôn waning 10th in full satisfaction, and it goes on to say that if by that date the sum of Rs. 7,500 is not paid the mortgaged lands and certain specified cattle then under attachment shall be given outright under a registered conveyance to the plaintiff, the cost of making the registered conveyance being borne by the plaintiff. This is Exhibit C.

It is undisputed that the sum of Rs. 7,500 was not paid nor tendered within the time fixed, but a few days after that time had expired an offer of payment was made. The money was not produced and tendered physically, but that is immaterial, as it is common ground that the Chetti refused to accept payment at all because the time agreed on had expired. He demanded the land and would have nothing else. Defendant expressly stated in his written statement that he refused to give the lands, and he adhered to that.

The learned Judge held the time was not of the essence of the contract, that payment was tendered within reasonable time, that defendant took the first opportunity after his release to tender it, and that the defendant did not by his own conduct commit a breach of the contract of 25th April. He held that plaintiff, by his refusal to accept payment within a reasonable time, had broken the contract and was not entitled to go back to the original contracts. He therefore dismissed the suit.

I think the learned District Judge failed to discriminate between the different parts of the contract. In purchases and sales of land it may generally be presumed that time is not of the essence of the contract, but such a presumption does not usually arise in respect of other contracts. In the present case, where the contract expressly states what is to happen on failure to pay on the fixed date, I cannot

doubt that it was the intention of the parties that time should be of the essence of the promise to pay Rs. 7,500. If defendant had not refused to give possession of the lands it might be that plaintiff would have no right except to sue for possession. But defendant flatly refused to give the lands, and he takes his stand on the contention that he tendered payment within a reasonable time, and that plaintiff is entitled to nothing but the Rs. 7,500. It is not clear on what date defendant was released, but I think the fact of his being in custody makes no difference. No doubt his confinement would make it more difficult for him to find the money, but it would not make it impossible. He was in custody at the time when the contract of 25th April was made, and in that contract it was not stipulated that he should be released before payment. In my opinion defendant has broken both parts of the contract of 25th April.

That contract, I think, was not a novation to which section 62 of the Contract Act applies. Plaintiff promised to accept Rs. 7,500 in full satisfaction, and in default of that payment by a fixed date he promised to accept the lands and cattle in full satisfaction. If the money had been paid in time, or if the lands and cattle had been given with the stipulated conveyance, then plaintiff's rights under the original mortgages would have been extinguished under section 63 of the Contract Act. But plaintiff did not accept the bare promise to pay Rs. 7,500 or to give up the lands and cattle in exchange for his rights under the mortgages, consequently, defendant having failed to perform the first promise and refused to perform the alternative one, the mortgages remain in full force, and the plaintiff is entitled to sue on them—*Manohur Koyal v. Thakur Das Naskar* (1).

It was objected by defendant that he had not attained the status of a landholder, and that the lands, being the property of Government, cannot be the subject of a mortgage decree. I do not think there is any substance in this. Defendant, having mortgaged the lands, cannot be heard to say that he had no authority to mortgage them. The question of his title to the lands, in my opinion, does not arise at all. There was an issue raised about plaintiff taking possession of the cattle, but I do not see how it is material to this case. The cattle were attached before the contract of the 25th April was made.

I would set aside the decree of the District Court, and give the plaintiff a decree as prayed in the plaint, with costs in both Courts.

*Fox, C.J.*—I concur.

Before Mr. Justice Irwin, C.S.I.

BAN U v. KING-EMPEROR.

*Murder—Culpable homicide—Intention—Nature of injury—Indian Penal Code, ss. 299, 300 (2), 304.*

A attacked his mother-in-law, Y, a woman of 55, with a *da*, but by mistake cut another woman, Z, on the arm. Z, who was 61 years of age, died from the effects of the wound, although the Civil Surgeon considered that the injury was not sufficient in the ordinary course of nature to cause death to a woman of her age.

(1)(1888) I.L.R. 15 Cal., 319.

1908.

A. L. M. S.  
SUBRA-  
MONIEN  
CHETTY  
v.  
GANGAYA.

Criminal  
Appeal  
No. 712 of  
1908.

December  
3rd,  
1908.

1908.

BAN U  
v.  
KING-  
EMPEROR.

The Sessions Judge considered that the second clause of section 300 of the Indian Penal Code was applicable on account of Y's age.

*Held*,—that this clause was not applicable, because (1) as the injury was actually caused to Z although intended for Y, Y's age did not affect the question at all, and (2) in view of the medical evidence and of the fact that the injury was not on a vital part of the body, A could not be held to have intended such bodily injury as he knew to be likely to cause the death of either Y, or Z, or such bodily injury as was likely to cause death. He was consequently only liable to sentence under the second part of section 304, Indian Penal Code.

*Shwe Ein v. King-Emperor*, (1905) 3 L.B.R., 122 ; *Po Tu v. King-Emperor*, (1908) 4 L.B.R., 306 ; referred to.

Appellant says he gave Ma Shwe U a push, and he cannot account for the *da* striking her. On the evidence there is no doubt at all that he cut her intentionally, though his intention was apparently to cut his mother-in-law.

Ma Shwe U died of shock after three days, and the shock was caused by the cut. Therefore the appellant caused her death.

The learned Sessions Judge found that the act was done with the intention of causing such bodily injury as was likely to cause death, and that by reason of facts falling under exception 1 to section 300 the offence was not murder, but culpable homicide not amounting to murder.

Taking the finding exactly as stated, the offence would not amount to murder, even if the exception did not apply—*Shwe Ein v. King-Emperor* (1) ; but in an earlier paragraph of the judgment it is stated that the act was one coming under the second clause of section 300, that is to say, an act done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. The learned Judge did not find that the appellant knew of any weakness or defect in Ma Shwe U which would render her likely to be killed by a cut which would not be likely to kill most persons. He applied the second clause because he was of opinion that the appellant knowing his mother-in-law to be 55 years of age he must have known, if he gave the matter a thought at all, that cutting her with a long *da* would be likely to cause her death. In this I think the learned Judge made two mistakes.

First, on the finding that the intention was to cut the mother-in-law, and that Ma Shwe U was cut by mistake, the mother-in-law's age could not affect the question at all. Clause two applies only in case of some weakness or defect in the person to whom the harm is caused. The Sessions Judge found Ma Shwe U's age, on the evidence of her daughter, to be 45.

Secondly, the Civil Surgeon believed Ma Shwe U's age to be 61 and he considered that the wound was not sufficient in the ordinary course of nature to cause death to a woman of that age. In the face of this evidence I cannot uphold the finding that the appellant intended to cause such bodily injury as he knew to be likely to cause the death of a woman of 45, or of 55, or even of 61. I take this view because the cut was not inflicted on a vital part of the body. If it were on a vital



part the severity of the hurt actually caused would be a matter of much less moment in arriving at the accused's intention.—*Po Tu v. King-Empress* (2). The facts found are that appellant gave Ma Shwe U a cut on the arm, and the resulting wound, though it actually caused her death, was not such a wound as would ordinarily cause the death of an elderly woman. *A fortiori* it would not ordinarily cause the death of an average human being.

I thus find that on the evidence it is not proper to presume that appellant acted with the intention specified in the second clause of section 300, nor even with the intention specified in the clause (if it may be called a clause) of section 299.

The offence, however, is very near the border line. The accused rushed wildly into the house, and without considering the consequences, slashed with a long *da* at the first person he met. It is right to presume that he did not make any nice choice of the part of Ma Shwe U's body on which his *da* was to fall. Therefore, while putting aside all question of intention, I find that appellant caused Ma Shwe U's death by doing an act with the knowledge that he was likely by such act to cause death, and he hereby committed culpable homicide not amounting to murder, an offence punishable under the second part of section 304, Penal Code. Appellant's act also amounts to voluntarily causing grievous hurt with a *da*, and for this offence the sentence of transportation for life would be legal under section 326, but I do not think it would be proper to confirm it under the circumstances.

I reduce the sentence to the maximum allowed by the second part of section 304, namely, ten years' transportation.

Before Mr. Justice Irwin, C.S.I.

1. MAUNG SAING }  
2. MA ME } v. SHWE LON.

*Higinbotham*—for appellants (defendants). *Villa*—for respondent (plaintiff).

*Sale of immoveable property—Transfer of ownership—Effect of registered instrument—Non-payment of consideration—Transfer of Property Act, s. 54.*

A registered conveyance, when the price is neither paid nor promised, does not effect a sale of immoveable property as defined in section 54 of the Transfer of Property Act.

*Sagaji v. Namdev*, (1897) I.L.R. 23 Bom., 525, referred to.

*Bairnath Singh v. Paltu*, (1908) I.L.R. 30 All., 125, dissented from.

Defendants-appellants executed on the 23rd October 1906 a conveyance to their son-in-law, the plaintiff-respondent, of a house and site, some paddy land and the standing crops on the paddy land for Rs. 4,000. Plaintiff alleged that defendants refused to give possession of the house and site, and he therefore sued for possession.

Defendants pleaded that the purchase-money was not paid; plaintiff had promised to pay it within one month, but had not paid it. Having failed to pay it he agreed to reconvey the property, and

1908.  
BAN U  
v.  
KING-  
EMPEROR.

Special Civil  
Second  
Appeal  
No. 226 of  
1907.

December  
7th, 1908.

(2) (1908) 4 L.B.R. 306.

1908.  
 MAUNG  
 SAING  
 v.  
 SHWE LON.

actually wrote the deed for that purpose, but refused to execute it because he was not paid Rs. 200 expenses.

The Court of first instance found that the purchase-money was not paid. It was found that neither party had told the whole truth, but the learned Judge believed the witness Maung San O, who said that the conveyance had been made *benami* to defeat defendants' creditors, and gave an account of the negotiations for reconveyance. The suit was therefore dismissed. The learned Judge of the Divisional Court did not reject Maung San O's evidence, or suggest that he should not be believed, but he said that neither in the evidence of this witness nor of any other witness called by the defence is there anything to show that there was no demand made for the Rs. 4,000 when the draft reconveyance was drawn up. This is a most surprising statement. Maung San O said, "Shwe Lon never said he had paid Rs. 4,000. Maung Saing never said 'Take now Rs. 2,000 and Rs. 2,000 after the harvest'." Maung Gyi said, "Shwe Lon agreed to give back the property if he were paid Rs. 250; Shwe Lon did not say that if he got back his Rs. 4,000 he would give back the property. Maung Saing did not propose to pay Rs. 2,000 then and Rs. 2,000 at the harvest." Venkatachellam Chetti said, "I heard nothing about asking for the return of Rs. 4,000 by Shwe Lon. I did not hear Maung Saing propose to pay Rs. 2,000 then and Rs. 2,000 at harvest." These witnesses all say that the negotiation split on the question of expenses. Shwe Lon would take no less than Rs. 200, while Maung Saing would not pay more than Rs. 100. It must be remembered that Shwe Lon denied that there was any talk about expenses.

It seems to me that Maung San O's evidence, if believed, proves conclusively that the consideration was not paid. There are no grounds for not believing San O.

The evidence of payment seems to be unreal. Shwe Lon says he called Nga Mo and Pyu Dok to carry the money from his father's house. Nga Mo says, "He sent for me to bring the money. I brought Rs. 4,000. There went with me Shwe Lon and Pyu Dok." None of the witnesses were asked in what form the money was brought. It was presumably in rupees. If it were notes Shwe Lon would have carried it himself. Rs. 4,000 weigh a little over 100 lbs. The idea of Nga Mo carrying this weight while the other two walked with him unladen is grotesque. If the burden was divided between them surely Nga Mo would have said so. Pyu Dok says merely, "I saw the Rs. 4,000 paid in Maung Saing's house. The money was brought from Shwe Lon's father's house." Not a word about himself helping to carry it.

The one point which seems to favour the theory that the consideration was paid is Maung Saing's admission that Shwe Lon said, "Give me back my Rs. 4,000." This admission was made near the end of a long cross-examination. Maung Saing had previously said that his mind was confused, and no doubt it was, as he was trying to tell half the truth. He had to steer clear of anything that suggested a *benami* transaction while telling the truth on other points. This admission is not sufficient to turn the scale in plaintiff's favour.

I agree with the District Judge that both parties lied, and that Maung San O gave the true version of the case. No consideration passed.

Respondent, however, contends that even if no consideration passed the conveyance is still valid, and appellants' only remedy is to sue for the consideration. He cites *Sagaji v. Namdev* (1) and *Bajinath Singh v. Pallu* (2). The former case is not much in point, as possession had been given. With the latter decision I am unable to agree. Under section 54 of the Transfer of Property Act sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. The essence of the contract is exchange. One party transfers ownership, the other pays or promises a price. When there is no exchange there is no sale; the transfer does not take effect. In the present case the conveyance recited that the price had been paid in full, but it is found as a fact that the price was not paid, and that the purchaser never promised to pay it. As it was neither paid nor promised there was no sale as defined in section 54.

But it is necessary to take care to keep within the pleadings. The defendants pleaded that plaintiff had promised to pay the price; can they successfully resist the suit when it is found that plaintiff did not promise to pay? The answer is that plaintiff did not say that he had promised. It was necessary for him to allege either that he had promised or that he had paid. He elected to allege the latter, and it is found that that allegation was false. He therefore cannot succeed.

The finding that the price was neither paid nor promised is essentially bound up with a finding that the transaction was *benami* and fraudulent, but the two are not indetical. The finding of fraud is incidental, and as fraud is not alleged in the pleadings it cannot govern the decision of the suit. The main issue was whether the price was paid, and that is found against the plaintiff. He never alleged that he had promised to pay the price: therefore the sale is not complete.

Fraud is put out of account because it was for defendant to plead it if it existed; it was not for plaintiff to deny fraud before it was alleged. The promise to pay, on the other hand, was an essential part of plaintiff's case as an alternative to payment.

For these reasons I set aside the decree of the lower Appellate Court, and dismiss the suit with costs in all Courts.

Before Mr. Justice Irwin, C.S.I.

S.A. SUBRAMONIEN CHETTY v. V.N.A.R. KUMARAPACHETTY.

Agabeg—for appellant (defendant).

A. D. Nariman—for respondent (plaintiff).

Equitable mortgage—Loan on promissory note with deposit of title-deeds—Execution of fresh promissory note—Renewal—Presumption regarding continuance of mortgage.

A borrowed a certain sum of money from B, executing two promissory notes for the amount, and at the same time depositing with B the title-deed of certain land by way of equitable mortgage to secure the loan. Subsequently the two promissory

1908.

MAUNG  
SAING

v.

SHWE LON.

Civil Second  
Appeal  
No. 208 of  
1907.

December 9th  
1908.

(1) (1899) I.L.R. 23 Bom., 525.

(2) (1908) I.L.R. 30 All., 125.

1908,  
 S. A. SUBRA-  
 MONIEN  
 CHETTY  
 v.  
 V. N. A. R.  
 KUMARAPA  
 CHETTY.

notes were replaced by one promissory note for the total amount then due for both principal and interest, the title-deed previously deposited remaining with B. B sued A and obtained a mortgage decree. On appeal it was urged that there was no valid mortgage.

*Held*,—that the mere fact of the retention of the title-deed by B was sufficient to raise a presumption that the intention of the parties was that it should be retained as security for the principal and all interest then due or thereafter to accrue on the original loan.

*Perianen Chetty v. Somasundara Iyer*, (1908) 14 Bur. L.R., 283, referred to.

On 17th March 1903 Po Nyun and his wife executed two promissory notes, for Rs. 350 and Rs. 2,000 respectively, in favour of the plaintiff-respondent, and deposited with him some documents including a conveyance of some land from Maung Shaung Ti to Maung Wan. The deposit was made by way of equitable mortgage to secure the repayment of the loans. The conveyance is Exhibit B.

On 18th June 1904 the two promissory notes were replaced by a fresh note for Rs. 3,000 the amount found to be then due for principal and interest. It was then agreed that the documents previously deposited should remain in plaintiff's possession as security for the note for Rs. 3,000, Exhibit A.

Plaintiff sued for a mortgage decree, and the present appellant was added as a defendant because Po Nyun and his wife on 28th March 1903 sold the land to Maung Thut, who mortgaged it to the appellant.

Plaintiff obtained a mortgage decree. Subramonien appealed to the Divisional Court, and his appeal was dismissed. He appeals to this Court on the ground that there was no valid equitable mortgage in favour of the plaintiff.

At the hearing it appeared that this ground of appeal was intended to include two distinct grounds. First it was contended that an equitable mortgage could not be effected by deposit of Exhibit B, because that document is not a conveyance to the mortgagor but to Maung Wan. No authority was cited in support of this argument, and there is nothing in it. The conveyance is undoubtedly a document of title to the land, and so far as appears from the record it was the only document of title to that land then existing. It is not alleged that the mortgagor was not the owner of the land at the time when he deposited the conveyance with plaintiff. The deposit constituted a valid mortgage on 17th March 1903.

Next it is contended that when the new promissory note was made on 18th June 1904 there was no agreement for a new mortgage. This might be disposed of by the express finding of the Court of first instance that there was such an agreement, a finding which was not disputed in the first appeal, but as this was not noticed at the hearing I shall deal with the point of law. Mr. Agabeg said that the old notes were discharged by the execution of a new note, and therefore the contract of deposit ceased. He cited the decision of Mr. Justice Moore on the Original Side of this Court in *Perianen Chetty v. Somasundara Iyer* (1). In that case the defendant executed a

(1). (1908) 14 Bur. L.R., 283.

promissory note for Rs. 10,000, and deposited some title-deeds to secure the loan. Subsequently the note was replaced by a fresh note for Rs. 19,000 and plaintiff retained the title-deeds but nothing was said about them. On the first note there was a memo. written by defendant to the effect that the sum taken on certain specified houses was Rs. 10,000. On the second note was a memo., also written by defendant, to the effect that these houses had been placed as security. The learned Judge held that as regards the original loan there was a completed transaction of mortgage evidenced by the delivery of the deeds, to the plaintiff, and the memo. was a mere note or narrative of the transaction which had already been completed. But when the second note was made, as there was no act of repositing the deeds the learned Judge held that the memo. at foot of the second note was not a mere narrative, but was itself the means by which the charge, if any, was created. It therefore would exclude any oral evidence, and as it was not registered the mortgage could not be proved. It is true that the learned Judge said that in the absence of any other evidence he thought the Court would not be justified in presuming merely from the retention of the title-deeds by the plaintiff that they were retained as security for the loan; but that dictum was not the ground on which the issue was decided, and it is not binding on me.

If an additional loan had been made in cash, and included in the new promissory note on the 18th June 1904, it may be that the mortgage would not cover that part of the debt; but I have no doubt that the mere fact of retention of the title-deed by the plaintiff is sufficient to raise a presumption that the intention of the parties was that it should be retained as security for the principal and all interest then due or thereafter to accrue on the original loan. That presumption was not rebutted.

The learned counsel also argued that there was doubt whether the conveyance B relates to the land described in the plaint. This point was not raised in the pleadings nor in either of the appeals. I decline to consider it.

The appeal contains another ground relating to priority, but it was not pressed, and there is nothing in it.

The appeal is dismissed with costs.

1908.

S.A. SUBRA-  
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Where admissions or incriminating actions by more than one accused person are deposed to, it is of the first importance that the witness should be made to describe as nearly as possible the exact words or conduct of each.	
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The appellant, an advocate of the Chief Court, was convicted of gross professional misconduct in having advised a client, G, to bribe a witness in a case under trial at the Criminal Sessions of the Chief Court.

The charge against him was based on two conversations between appellant and E, his senior in the case. E's statement regarding these conversations was corroborated by certain persons to whom he had repeated their purport on the day they took place. Both these conversations were hurried; the actual words used in one were not completely remembered by E, and the words that were accurately remembered might, in certain contexts, have an innocent meaning; the other was a whispered conversation in Court during the examination of a witness by E. The charge was also supported by admissions made by the client G to E and to the Government Advocate, but G, when examined as a witness, denied having made these admissions.

*Held*,—that the admissions made by G, even if admissible to discredit his sworn statement as a witness, were not admissible as against appellant; that although the statements of the persons to whom E reported his conversations with appellant were admissible as supporting the credibility of E's evidence, the charge against appellant depended entirely on the correctness of E's impression of

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<i>Queen v. Dautre</i> , (1884) L.R. 9 A.C., 745 ; <i>C. Ross Alston v. Pilambar Das</i> , (1903) I.L.R. 25 All., 509 ; <i>Kennedy v. Brown</i> , (1863) 13 C.P., N.S., 677 : referred to.	
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Where a suit was brought and the plaint signed by a duly authorised agent holding a general power of attorney, but the proceedings did not show that at the time when the suit was brought, the principals were living outside the jurisdiction of the Court or were, by reason of absence or for any other good cause, unable to sign the plaint themselves.	
Held,—that as the merits of the case were not affected, objections on these grounds could not be considered when raised for the first time in second appeal ; but that they should have been raised in the original proceedings, when the fact of the plaintiffs' absence or otherwise could have been inquired into.	
<i>Abdul Karim v. Pana Mustan</i> , 8 Bur. L.R., 103 ; 1 L.B.R., 191 ; <i>Bisanda v. Lakhmchand Kisanchand</i> , 6 Bom. H.C.R., 159 ; <i>Moolala &amp; Co. v. Poonasawmy</i> , 2 L.B.R., 41 ; <i>Basdeo v. Smidt</i> , (1899) I.L.R. 22 All., 55 ; referred to	
<i>Munoo Dossee v. Ishan Chunder Banerjee</i> , 15 W.R., 245 ; <i>Parvatibai v. Vinayek Pandurang</i> , (1887) I.L.R. 12 Bom., 69 ; followed.	
<i>Tha Zan v. Tha Dun</i> ...	284
AGENT, SUIT BY—wrong person as plaintiff—substitution of plaintiff—appeal—principal's right of appeal— <i>Code of Civil Procedure</i> , s. 27— <i>Indian Contract Act</i> , s. 230.	
A suit was instituted by one Sellappa Chetty, under the style of A.L.S.P.S. Sellappa Chetty. The plaint did not show that Sellappa was not himself the principal, but it transpired in evidence that he was merely the agent of Soobramonien Chetty, and that the letters A.L.S.P.S. were part of the latter's name. The suit was dismissed on the ground that Sellappa, being merely an agent, could not sue in own name. Soobramonien appealed to the Chief Court.	
Held,—that as the suit had been filed in the name of the wrong person by bona fide mistake, and as the substitution of the proper plaintiff	

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was necessary for the determination of the real matter in dispute, the lower Court should have substituted Soobramonien as plaintiff under section 27 of the Code of Civil Procedure; and that as action under that section might have been taken at the instance of Soobramonien, he had a right to appeal against the order dismissing the suit. The case was remanded for substitution of the proper plaintiff and for decision on the merits.	
<i>Abdul Karim v. Pana Mustan</i> , 1 L.B.R., 191; <i>Chokalingam Chetty v. Maung Aung Baw</i> , 1 L.B.R., 350; distinguished.	
<i>Carter v. Misree Lal</i> , (1870) 2 N.W.P. H.C., 179; <i>Sardarmal Jagonath v. Aranvayal S. Moodaliar</i> , (1896) I.L.R. 21 Bom., 205; <i>Seshamma v. Chennappa</i> , (1897) I.L.R. 20 Mad., 467; <i>Juggannath Pershad Dutt v. Hogg</i> , (1869) 12 W.R., 117; referred to.	
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A owed B Rs. 10,000, part of which sum was secured by two mortgages. B agreed to accept, in full satisfaction of all his claims, Rs. 7,500, if paid by a certain date, or in default of such payment a transfer by registered conveyance of the mortgaged property and certain other property which had been attached by B. The Rs. 7,500 was not paid by the date specified, but was offered shortly after. B, however, then refused it and demanded the property which A refused to transfer to him.	
<i>Held</i> ,—that if the Rs. 7,500 had been paid by the date specified, or if the property had been transferred as agreed upon, B's rights under the original mortgages would have been extinguished under section 63 of the Contract Act; but that as B did not accept, in exchange for his rights under the mortgages, a bare promise to pay the Rs. 7,500 or to transfer the property, section 62 did not apply and A's failure to pay the Rs. 7,500 in time and his refusal to transfer the property left the mortgages in full force.	
<i>Manohur Koyal v. Thakur Das Naskar</i> , (1888) I.L.R. 15 Cal., 319, referred to.	
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class Magistrate under section 349, Code of Criminal Procedure—passed a sentence of five years' imprisonment on one of the accused. <i>Held</i> ,—that in view of the last clause of the section 349, Code of Criminal Procedure, a District Magistrate acting under this section must be regarded as a Magistrate not empowered under section 30, Code of Criminal Procedure, and that as the sentence of five years' imprisonment was <i>ultra vires</i> , appeal lay not to the Chief Court but to the Court of Session. <i>Nga Po Saing v. Queen-Empress</i> , P.J., L.B., 516, referred to <i>Nga Pya v. King Emperor</i> ... ..	Page. 53
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APPEALABLE SENTENCE AT SUMMARY TRIAL—order for security for good behaviour in addition to sentence of imprisonment— <i>Rangoon Police Act</i> , ss. 30, 31A— <i>Criminal Procedure Code</i> , ss. 408, 414, 415.	
A was tried at a summary trial under section 30 of the <i>Rangoon Police Act</i> , and was sentenced to three months' rigorous imprisonment and further ordered to give security for good behaviour under section 31A.	
<i>Held</i> ,—that the addition of the order for security rendered the case appealable.	
<i>King-Emperor v. Po Thin</i> , 2 L.B.R., 72; <i>Ba Thaw v. King-Emperor</i> , 4 L.B.R., 354; referred to.	
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A, a Mahomedan, died in 1884, and his estate was divided among his heirs by an arbitrator. B, the eldest son of A, had disappeared in 1870 and had not since been heard of; and in accordance with a rule of Mahomedan Law, a share of the estate was set aside for him as a missing heir.	
C, the son of B, claimed this share, to which he would have been entitled, under Mahomedan Law, if B, had been alive at the time of A's death, but not otherwise.	
<i>Held</i> ,—that the arbitrators' setting aside of a share of the estate for the missing heir, B, did not amount to an admission by the other heirs, or to evidence that B was then alive.	
<i>Mashar Ali v. Budh Singh</i> , (1884) I.L.R. 7 All., 297; <i>Rango Balaji v. Mudiycppa</i> , (1898), I.L.R. 23 Bom., 96; followed.	
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## BASIS OF DECISION IN LAND ACQUISITION PROCEEDINGS BEFORE COURT —*Land Acquisition Act, 1894, s. 22.*

Proceedings before the Court under section 22 of the Land Acquisition Act are not a continuation of the administrative proceedings before the Collector, but are judicial. The decision therein must therefore be based solely on evidence before the Court or on admissions by the parties.

*Ezra v. Secretary of State for India in Council*, (1905) I.L.R. 32 Cal., 605, followed.

*Shwe Gaung v. The Collector* ... .. 71

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BENAMI SALE TO DEFRAUD INCUMBRANCER—*failure of fraudulent object—right of owner to recover possession from benami purchaser—limitation of suit to recover possession without setting aside void instrument—inoperative instrument—Indian Limitation Act, Schedule II, Articles 91, 144.*

A executed a *benami* deed of sale of certain land to B, to defeat the claims of X, who held a mortgage of the land. X sued A for the amount of the mortgage debt, and succeeded, having proved that the deed of sale was without consideration, and that at the time of its execution B was aware of the existence of the mortgage. The land, however, remained in B's possession.

Subsequently A sued B for possession of the land.

*Held*,—that in spite of A's attempt to defraud X by the deed of sale, he was entitled, as the fraud had failed, to recover possession of the land from B.

*Held, further*, that the *benami* deed of sale being inoperative, it was not necessary that it should be set aside as a preliminary to obtaining possession of the land. The suit was therefore governed not by Article 91, but by Article 144 of the second schedule to the Limitation Act.

*Taylor v. Bowers*, 1 Q.B.D., 291; *Symes v. Hughes*, L.R. 9 Eq., 475, at p. 479; *In re Great Berlin Steamboat Co.*, L.R. 26 Ch D., 616; followed.

*Kearley v. Thompson*, 24 Q.B.D., 742, referred to.

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*In re The Netherlands Trading Society* ... .. 320

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The third proviso to section 118, Criminal Procedure Code, that a bond for keeping the peace or for good behaviour in respect of a minor shall be executed only by his sureties, does not apply to bonds of first offenders released on probation under section 562, Criminal Procedure Code.

*King-Emperor v. Nga Pan Tin*, 2 L.B.R., 137, overruled.

*King-Emperor v. Nga Po Chon*, 2 L.B.R., 168, referred to.

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A obtained an advance from B and signed an agreement to work for him for one year. He absconded, however, after working for 15 days only. B applied for a warrant, under section 2 of the Workman's Breach of Contract Act, within a month of the expiry of the term of the contract. At the instance of the respondent's pleader, the case was adjourned to the last day of the period of contract, and was then dismissed on the ground that no order could be made after the expiry of the contract.	
Held,—that the delay in the disposal of the case did not defeat B's right to compel the refund of the money advanced.	
<i>Khoda Buksh v. Moti Lal Johori</i> , (1906) 11 C.W.N., 247 dissented from.	
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Neither ceremony nor written document is required to constitute a <i>keittima</i> adoption under Buddhist Law. The consent of the natural parents and the taking of the child by the adoptive parents, with the intention that the child shall inherit, must be proved to establish such an adoption.	
The fact that plaintiff was an adopted daughter was held to be proved chiefly by the fact that she was treated for years in the same way as her sister who was admittedly an adopted daughter, coupled with the natural father's direct and positive evidence of his consent and of the adoption.	
<i>Ma Me Gale v. Ma Sa Yi</i> ...	172
BUDDHIST LAW : CHINESE CUSTOMARY LAW— <i>suit for pre-emption—exemption from Indian Law of Succession—Indian Succession Act, (1865), ss. 5, 331—Burma Laws Act, 1898, s. 13.</i>	
A claimed a right of pre-emption over certain property that had belonged to her father B, who was a Chinaman. She based her claim on Chinese customary law.	
Held,—that (1) if B was not a Buddhist, the provision of the Indian Succession Act, and not Chinese customary law would apply to the property ; and (2) if B was a Buddhist, the property would be exempt from the operation of the Indian Succession Act. In the latter case, in order to succeed it would be necessary for A to show that there is a Chinese Buddhist law in China applicable to Chinese Buddhists only, as apart from the customary law of the country, by which a right of pre-emption was given in respect of the land in dispute.	
<i>Fone Lan v. Ma Gye</i> , 2 L.R., 95, referred to.	
<i>Apana Charan Chowdry v. Shwe Nu</i> ...	124
— <i>right of pre-emption right of widow to dispose of family property subject to children's right of pre-emption.</i>	
A claimed under Buddhist law a right of pre-emption over certain land, which had been joint family property of his father and mother and had been sold by his mother after his father's death.	

<i>Held</i> ,—that the rule regarding the right of a Buddhist widow to dispose of family property after her husband's death, viz., that she has an absolute right of disposal over her own share and a life interest in the remainder, does not affect, but is subject to the general rule regarding the right of all co-heirs to pre-emption. A had therefore a right of pre-emption over the whole property. <i>Ma On v. Shwe O</i> , S.J., L.B., 378; <i>Maung Hlaing v. Tha Ka Do</i> , P.J., L.B., 65; <i>Tha Nu v. Kya Zan</i> , 2 L.B.R., 167; <i>Nga Myaing v. Mi Baw</i> , S.J., L.B., 39; <i>Ma Ngwe v. Lu Bu</i> , S.J., L.B., 76; referred to.	
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BUDDHIST LAW : INHERITANCE—claim of children of divorced couple to property acquired during second marriage—filial relationship.	
Where one of a Burmese Buddhist divorced couple marries again and has children by the second spouse, the children of the first marriage are not entitled to share in property acquired during the second marriage, unless they have maintained filial relations with the parent concerned.	
Facts constituting filial relationship considered.	
<i>Mi Thaik v. Mi Tu</i> , S.J., L.B., 184; <i>Ma Shwe Ge v. Nga Lan</i> , S.J., L.B., 296; <i>Maung Hmat v. Ma Po Zon</i> , P.J., L.B., 469; <i>Ma. Pon v. Maung Po Chan</i> , 2 U.B.R., 1897—01, 116; <i>Mi San Mra Rhi v. Mi Than Da U</i> , 1 L.B.R., 161; <i>Ma Thet v. Ma San On</i> , 2 L.B.R. 85; followed.	
<i>Maung Ba Kyu v. Ma Zan Byu</i> , P.J., L.B., 299, referred to.	
<i>Ma Paw v. Ma Mon</i> ... ..	272
—————interest of widow in property inherited by husband during marriage—inherited property—ancestral property—widow's share of joint property.	
The interest of the widow of a Burman Buddhist in property inherited by him during their marriage, when children of the marriage also survive, is the same as her interest in her deceased husband's share of the property jointly owned by him and her. The property descends to the children, but she has a life interest in it, with the right to sell it in case of necessity.	
<i>Maung Te v. Ma Kyu</i> , (1900) 2 Chan Toon's L.C., 95; <i>Maung Waik v. Maung Nyein</i> , (1899) 2 Chan Toon's L.C., 77; <i>Ma On v. Shwe O</i> , (1886) S.J., L.B., 378; <i>Shwe Yo v. Mi San Byu</i> , S.J., L.B., 108; <i>Maung Gale v. Maung Bya</i> , 4 L.B.R., 189; referred to.	
<i>Ma Nyo v. Ma Yauk</i> ... ..	256
—————share of child of deceased first wife in property inherited by father after first and before second marriage—inherited property.	
A, a Burman Buddhist, died leaving (1) a son by his deceased first wife, (2) his second wife, and (3) children by his second wife. He had inherited property, moveable and immoveable, after the death of his first wife and before his marriage with his second wife.	
<i>Held</i> ,—that the son by the first wife was entitled to a half share of the property so inherited.	
<i>Ma Ba We v. Sa U</i> , 2 L.B.R., 174; <i>Chit Saya v. Mein Gale</i> , 2 L.C. (Chan Toon), 97; <i>Po Sein v. Ma Pwa</i> , 1 L.C. (Chan Toon), 292; <i>Shwe Ngon v. Ma Min Dwe</i> , S.J., L.B., 110; <i>Mi Ka v. Maung Thet</i> , S.J., L.B., 6; <i>Myat Kaung v. Ma Gyaing</i> , P.J., L.B., 534; <i>Tun Lu v. Po Yauk</i> , S.J., L.B., 255; referred to.	
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BUDDHIST LAW : INHERITANCE—share of child of deceased first wife in property inherited during second marriage—inherited property—ancestral property.	
A, a Burman Buddhist, died leaving two children, B and C. B was the offspring of his first marriage, and C the offspring of a second marriage contracted after the death of the first wife. A had inherited certain property from his mother during the continuance of the second marriage. The second wife had died before A.	
Held,—that B and C were entitled to equal shares in the said property.	
<i>Shwe Ngon v. Ma Min Dwe</i> , S.J., L.B., 110 ; <i>Mi So v. Mi Hnat Tha</i> , S.J., L.B., 177 ; <i>San On v. Mi Shwe Daing</i> , S.J., L.B., 223 ; <i>Tun Lu v. Po Yauk</i> , S.J., L.B., 255 ; <i>Ma Min E v. Ma Kyaw Tah</i> , P.J. L.B., 361 ; <i>Maung Ye v. Ma Me</i> , P.J., L.B., 418 ; referred to.	
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share of eldest daughter in property inherited by mother.	
A, a female Burmese Buddhist, died leaving a husband and five daughters.	
Held,—that the eldest of these daughters was entitled to a quarter share of certain property which A had inherited from her mother.	
<i>Ma Kyi Kyi and one v. Ma Thein and others</i> 3 L.B.R., 8 ; <i>Ma Thin and one v. Ma Wa Yon</i> , 2 L.B.R., 255 ; referred to.	
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presumption as to death—presumption as to date of death—Indian Evidence Act, 1872, ss 107, 108.	
A, a Mahomedan, died in 1884, and his estate was divided amongst his heirs by an arbitrator. B, the eldest son of A, had disappeared in 1870 and had not since been heard of ; and in accordance with a rule of Mahomedan Law, a share of the estate was set aside for him as a missing heir.	
C, the son of B, claimed this share, to which he would have been entitled, under Mahomedan Law, if B had been alive at the time of A's death, but not otherwise.	
Held,—that the special rules regarding burden of proof in sections 107 and 108 of the Indian Evidence Act could only be applied with reference to the date of the suit, and not to the question whether B was alive or dead on a specified prior date ; and that the burden of proving that B was alive in 1884 lay upon C, who affirmed it.	
<i>Mazhar Ali v. Budh Singh</i> , (1884) 1 L.R., 7 All., 297 ; <i>Rango Balaji v. Mudiyeppa</i> , (1898) 1 L.R., 23 Bom., 296 ; followed.	
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CHEATING—'fraudulently', meaning of— <i>purchase of opium by per-</i>	
<i>sonation</i> — <i>Indian Penal Code</i> , s. 415.	
The accused, by giving a false name and address, succeeded in pur-	
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which would not have been sold to him if he had not practised this	
deceit.	
Held (Irwin, Offg. C. J., dissenting),—that he committed the offence of	
cheating as defined in section 415 of the <i>Indian Penal Code</i> .	
Meaning of the word "fraudulently" discussed.	
<i>Queen-Empress v. Abbas Ali</i> , (1896) I.L.R. 25 Cal., 512; P.J.,	
L.B., 437; <i>Kedar Nath Chatterjee v. King-Emperor</i> , 5 C.W.N.,	
897; <i>Queen-Empress v. Muhammad Saeed Khan</i> , (1898) I.L.R.,	
21 All., 113; <i>Queen-Empress v. Soshi Bhushan</i> , (1893) I.L.R. 15	
All., 210; <i>Crown v. Po Lu</i> , 1 L.B.R., 357; <i>Kotamraju Venkat-</i>	
<i>royadu</i> , 1 Weir's Criminal Rulings, 538a, 4th edition; <i>Regina v.</i>	
<i>Toshack</i> , 4 Cox, Cr. C., 38; <i>Queen-Empress v. Vilhal Narayan</i> ,	
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<i>King-Emperor v. Yena</i> , 4 L.B.R., 49; <i>Ala Dya v. King-Emperor</i> , 41	
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There is no provision of law requiring a Magistrate who has attached property under section 88 of the Code of Criminal Procedure to investigate the claims of third persons to the ownership of such property. If a Magistrate passes an erroneous order in respect of such property, the only remedy is by way of civil suit.	
<i>Queen-Empress v. Shcodihal Rai</i> , (1884) I.L.R. 6 All., 487; <i>Queen-Empress v. Kandappa Goudan</i> , (1896) I.L.R. 20 Mad., 88; followed.	
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CLAIM TO ATTACHED PROPERTY—fraudulent transfer—fictitious sale—burden of proof—possession at the time of attachment— <i>Civil Procedure Code, s. 283.</i>	
Certain immoveable property was attached by A in execution of a decree against B. C, the daughter of B, instituted a suit to establish her right to the property, alleging that she had bought it from B. She failed to show that she had been in possession at the time of the attachment.	
<i>Held</i> ,—that the burden of proving her right to the property lay upon C.	
<i>Kadappa Chetty v. Shwe Bo</i> , 2 L.B.R., 152, distinguished.	
<i>Govind Almaram v. Santai</i> , (1887) I.L.R., 12 Bom., 270, followed.	
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CLAIMS TO INHERITANCE—evidence regarding death-bed attentions or expenditure on funeral—neglect of duties of affection and kinared— <i>Probate and Administration Act, 1881, s. 33—Court-fees Act, s. 191.</i>	
In dealing with claims connected with questions of inheritance, little or no importance should be attached to evidence regarding death-bed	



attentions or expenditure on the funeral obsequies, unless it can be shown that the ordinary duties of affection and kindred have been intentionally and deliberately neglected.	
<i>Chit Kywe v. Maung Pyo</i> , 2 U.B.R. (1892—96), 184, followed.	
<i>Maung Po v. Kya Zaing</i> , 1 L.B.R., 178, referred to.	
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A complaint, as defined under section 4 of the Code of Criminal Procedure, was presented by the complainant to a Magistrate, who recorded that he took cognizance of the case under section 190 (c) of the Code.	
<i>Held</i> ,—that the Magistrate really took cognizance under section 190 (1) (a) of the Code.	
<i>Per Ormrod J.</i> ,—If the Magistrate was competent to take cognizance under section 190 (1) (c), he must be deemed to have so taken cognizance. In the present case, the Magistrate was not so competent, because the complaint was of an offence under the Municipal Act, section 195 of which bars the taking of cognizance except upon complaint. The Magistrate therefore took cognizance under section 190 (1) (a).	
<i>King-Emperor v. Po Chon</i> , 2 L.B.R., 311, referred to.	
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A sentence of imprisonment cannot be ordered to run concurrently with another sentence not passed at the same trial.	
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— <i>report by Superintendent of Vaccination—Vaccination Act</i> , 1880, s. 18— <i>order for costs—Court-fees Act</i> , 1870, s. 31.	
A report made by a Superintendent of Vaccination under section 18 of the Vaccination Act, that a notice issued by him has not been complied with, is not a complaint of an offence, and a Magistrate who makes an order for compliance with such notice cannot direct the refund of court-fees under section 31 Court-fees Act, or the payment of costs.	
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An accused person made a confession under improper inducement by the police. The committing Magistrate admitted the confession in evidence, and examined the accused with regard to it. The accused admitted it.	
<i>Held</i> ,—that the confession being inadmissible the Magistrate should not have questioned the accused upon it. The examination of the accused, so far as it concerned the confession, could not be said to have been duly recorded, and therefore neither the confession, nor the answers to the Magistrate's questions regarding it, were admissible in evidence in the Court of Session.	
When a fact is discovered in consequence of a statement made by an accused person in the custody of the police, only so much of the statement as led directly to such discovery may be proved under section 27 of the Evidence Act.	
The accused had pointed out to the police the places where certain acts had, according to his statement, been done.	
<i>Held</i> ,—that this did not render his statements regarding such acts admissible in evidence.	
<i>Gaung Gyi v. King-Emperor</i>	244
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A contracted to sell a piece of land to B without disclosing the existence of a mortgage on it. A failed to furnish particulars sufficient to enable B to prepare a conveyance. B therefore sued A to compel him to execute a conveyance or in the alternative for damages for breach of contract.	
Held,—that under section 18 (c) of the Specific Relief Act, B was entitled to a decree for specific performance of the contract of sale, and that if A did not pay off the mortgage before executing the conveyance, B was entitled, under section 55 (5) (b) of the Transfer of Property Act, to retain out of the purchase-money the amount payable to the mortgagee.	
<i>Ayesha Bee v. V. Somasundram Iyer</i> , 11. Bur. L.R., 257, referred to.	
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An order for compensation under section 22, Cattle Trespass Act, for the illegal seizure or detention of cattle is a conviction within the meaning of the Code of Criminal Procedure, and is therefore appealable.	
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When court-fees have once been paid on the value of the whole of an estate in respect of which letters of administration have been granted no further court-fee is leviable on a subsequent grant of letters of administration under section 229, Indian Succession Act,	

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in respect of an unadministered portion of the estate, even though the value of the property has increased in the meanwhile.	
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In consequence of the decree in a civil suit, A, the defendant, was evicted from a house and the land on which it stood, and B, the Plaintiff, was put in possession. Two days later A, whose defence in the suit had been barred on a legal point, re-entered the land and lived in the house. He was allowed to remain for 19 months, at the end of which time B prosecuted him for criminal trespass by the re-entry.

*Held*,—that the circumstances did not justify a presumption that A's intention was to annoy B; and as no other criminal intention was even suggested, that the offence of criminal trespass had not been committed.

*Po Ke v. King-Emperor*, 2 L.B.R. 319, distinguished.

*Po Lu v. Shwe Kyo* ...

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...unlawful remaining—remaining on another's property after conviction for trespass—*Indian Penal Code, s. 441.*

The accused, after having been convicted of criminal trespass committed by entering on certain land, were again prosecuted for a further trespass by remaining on the land in spite of the previous conviction.

*Held*,—that the accused were not liable to be again convicted.

*Ma Hla Ya v. King-Emperor* ...

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A was arrested under section 478 of the Code of Civil Procedure. On his being brought before the Court, the judge orally ordered the bailiff to keep him in custody. The bailiff in turn orally ordered a process-server to take charge of him, and this was done.

The bailiff and process-server were subsequently prosecuted and convicted, under section 344 of the Indian Penal Code, of wrongful confinement.

*Held*,—that section 78 of the Indian Penal Code does not extend to the oral order of a judge; that as section 481 of the Code of Civil Procedure only authorises a judge to commit persons to jail, the mistake of the bailiff and the process-server, in believing that their oral orders justified their action, was purely a mistake of law and not of fact; and that therefore they were rightly convicted.

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but not delivered. The company, although unable to identify the destroyed and undelivered packages, accounted for the whole number of packages consigned.	
<i>Held</i> ,—that in view of the perishable nature of the goods and frailty of the packing, the steamship company could not be held liable for the packages destroyed; and that as regards the packages undelivered for want of marks, the consignees became tenants in common thereof in proportion to the quantities that should have been delivered to each of them; that A, B and C, therefore, having refused the shares offered to them, could not hold the company responsible.	
<i>Spence v. The Union Marine Insurance Company, Limited</i> , L.R. 3 C.P., 427; <i>Smurthwaite v. Hannay</i> , (1894) L.R. Appeal Cases, 494, at pages 505 and 507; followed.	
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DISOBEDIENCE OF RAILWAY RULES— <i>duty and responsibility of Station Master—consequences of disobedience of rules—collision—Indian Railways Act, 1890, s. 101.</i>	
A, an Assistant Station Master, expecting the arrival of a down mail train in his station, instructed his jemadar to let it come into the station main line, and after it had come in, to set the points at the up end of the station so as to allow an up goods train to proceed from a side line. At the time of issuing these instructions he gave the keys of the points to the jemadar although the points were already set for the main line. The jemadar, without waiting for the mail to come in, set the points for the side line on which the goods train stood. On the approach of the mail, A allowed the	

signal to be given for it to enter the station, without further satisfying himself, as required by the rules by which he was bound, that the points were correctly set. The mail in consequence ran on to the side line and collided with the goods train.

*Held*,—that A endangered the safety of many persons by his disobedience of the rules, and his conduct therefore brought him within the terms of section 101 (b) of the Act.

*King-Emperor v. A. C. Dass*, 4 L.B.R., 139, followed.

*Shanker Balkrishna v. King-Emperor*, (1904) I.L.R. 32 Cal., 73, distinguished.

*King-Emperor v. M. N. Atchataramayya* ... .. 350

DISOBEDIENCE OF RAILWAY RULES—*duty and responsibility of Station Master—consequences of disobedience of rules—Indian Railways Act, 1890, s. 101.*

A, an Assistant Station Master at Pyuntaza, having ascertained that the line was clear to Daiku, the next station, gave the ticket conveying authority to proceed to the guard of a down train, which was then waiting at his station. He then received a message from Daiku asking him to withdraw the ticket, in order to allow an up train to proceed from Daiku to Pyuntaza. In contravention of the rules, by which he was bound, he at once signalled to Daiku that the line was clear, without first getting back the ticket from the guard. On going out to get the ticket he found that the down train had started. The result was that the two trains met between the stations, although the drivers were able to stop in time to avoid a collision.

Being prosecuted under section 101 of the Railways Act for endangering the safety of persons by disobedience of rules, A pleaded that he told the guard of the down train not to start without telling him.

*Held*,—that although, if the guard started without A's verbal permission, he also contravened a rule. A's disobedience of rule in connection with the written ticket was the more serious, and was the principal cause of the danger that ensued. A was convicted under section 101, and was sentenced to a term of imprisonment.

*Shankar Balkrishna v. King-Emperor*, (1904) I.L.R. 32 Cal., 73, distinguished.

*King-Emperor v. Po Gyi* ... .. 353

... .. *responsibility of Station Master—consequences of disobedience of rules—collision—Indian Railways Act, 1890, s. 101.*

A, an Assistant Station Master, allowed the signal to be given for a train to run through his station without satisfying himself, as required by the rules made under the Railways Act, that all the prescribed precautions had been taken by the jemadar subordinate to him. The train was switched off the main line on to a line on which some waggons were standing, and collided with them. This could not have occurred if the rules have been complied with. A was tried, under section 101 of the Act, for having, when on duty, endangered the safety of persons travelling in the train by disobeying general rules. He was convicted, and fined Rs. 30, the Magistrate remarking that he considered his offence merely technical and that the collision was practically the result of the acts and omissions of the jemadar.

*Held*,—that the Magistrate's view of the relative responsibility of A and the jemadar was, in view of their relative positions, radically wrong, and that A was the more guilty of the two.

*Held, further*,—that the essence of the offence was the danger or risk entailed by the neglect of the rules, irrespective of the consequences that actually ensued.

A substantive sentence of imprisonment was passed upon A.

<i>Snell and Seddons v. The Queen</i> , (1883) I.L.R. 6 Mad., 201 ; <i>Burma Railways Company v. Fox</i> , Criminal Revision No. 1500 of 1901 (unreported) ; referred to.	
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In section 517 of the Code of Criminal Procedure, the words “property regarding which any offence appears to have been committed” include immovable property.	
Where an accused person was acquitted of criminal trespass on the ground that the trial was barred by section 403 of the Code of Criminal Procedure.	
<i>Held</i> ,—that the proceedings in connection with such acquittal did not constitute an inquiry or trial within the meaning of section 517, and that therefore no order for the disposal of the property in respect of which the trespass was alleged could be passed at the conclusion of such proceedings.	
<i>Tun Hla v. Shwe Ngo</i> ... ..	229
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An easement of necessity cannot arise in any other way than on severance of tenements.	
Where A claimed the right to take plough and water through B's land, and there was no allegation of severance.	
<i>Held</i> ,—that A's claim could be based only on clause (2) of section 26 of the Limitation Act.	
<i>Morgan v. Kirby</i> , (1878) I.L.R. 2 Mad., 46, followed.	
<i>Tha Zan v. U San Win</i> , 2 L.B.R., 134, referred to.	
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EQUITABLE MORTGAGE— <i>loan on promissory note with deposit of title-deeds—execution of fresh promissory note—renewal—presumption regarding continuance of mortgage.</i>	
A borrowed a certain sum of money from B, executing two promissory notes for the amount, and at the same time depositing with B the title-deed of certain land by way of equitable mortgage to secure the loan. Subsequently the two promissory notes were replaced by one promissory note for the total amount then due for both principal and interest. The title-deed previously deposited remaining with B. B sued A and obtained a mortgage decree. On appeal it was urged that there was no valid mortgage.	

*Held*,—that the mere fact of the retention of the title-deed by B was sufficient to raise a presumption that the intention of the parties was that it should be retained as security for the principal and all interest then due or thereafter to accrue on the original loan  
*Pertaven Chetty v. Somasundaram Iyer* (1904) 14 Bur. L.R., 283, referred to.

<i>S. A. Subramonian Chetty v. V. N. A. R. Kumarappa Chetty</i> ...	371
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EVIDENCE OF DISCHARGED CO-ACCUSED— <i>admissibility of evidence—competent witness—discharged accomplice—discharge of accused without recording reasons—Indian Evidence Act, 1872, ss. 118, 132, 133, 146.</i> A and B were sent up for trial together by the Police on a charge of murder. The Magistrate discharged A before recording any evidence and without recording any reasons, and subsequently examined him as a witness. It had been argued that the omission to record reasons rendered the discharge illegal, and that consequently A's evidence was inadmissible. <i>Held</i> ,—that whether A's discharge was or was not illegal, his evidence was admissible, but not worthy of credit. <i>Empress v. Durant</i> , (1898) I.L.R. 23 Bom., 213, followed. <i>Banu Singh v. King-Emperor</i> , (1906) I.L.R. 33 Cal., 1353, referred to. <i>Aung Min v. King-Emperor</i>	362
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EXECUTION SALE, MATERIAL IRREGULARITY IN— <i>wrong time—proclama- tion—Civil Procedure Code, s. 311.</i> A sale in execution of a decree was held 8 at A.M., although the hour advertised in the proclamation was 10 A.M. <i>Held</i> ,—that this was a material irregularity in conducting the sale within the meaning of section 311 of the Code of Civil Proce- dure. <i>Basharutulla v. Umachurn Dutt</i> , (1889) I.L.R. 16 Cal., 794, dissented from. <i>Surno Moyee Debi v. Dakhina Runjan Sanyal</i> , (1896) I.L.R. 24 Cal., 291, followed. <i>Sit Pwan v. Ngwe Thain</i>	123
— <i>SUIT TO SET ASIDE—effect of confirmation of execution— sale—Limitation Act, Schedule II, article 12 (a)—Code of Civil Procedure, s. 312.</i> A sale in execution of a decree does not affect the right, title and interest in the property sold of persons other than the judgment- debtor.	

Article 12, clause (a), of the second schedule of the Limitation Act only refers to suits by persons who are bound by the confirmation of the sale under section 312 of the Code of Civil Procedure, and not to suits by persons other than the purchaser or the parties to the suit in execution of the decree of which the sale was held.

*Lalchand Ambaidas v Sakaram*, (1868) Bom. H.C. Rep., A.C.J., 139; *Parakh Ranchor v. Bai Vakhat*, (1886) I.L.R. 11 Bom., 119; *Vishnu Keshav v Ramchandra Bhaskar*, (1886) I.L.R. 11 Bom., 130; *Kadar Hussain v. Hussain Sahib*, (1895) I.L.R. 26 Mad., 118; followed.

*Hajee Goya Kaka v. S. A. Zaccheus* ...

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FABRICATING FALSE EVIDENCE—*false entry or statement—intention—authorised signature for another—Indian Penal Code, s. 192.*

A petition praying that a fishery lease might be transferred from A to B and purporting to be signed by A and B, was presented to the Deputy Commissioner by A. B was not present, but his son was, and admitted having signed his father's name. He was subsequently prosecuted, although no attempt was made to show that he had acted fraudulently and without his father's authority, and was convicted of fabricating false evidence under section 192, Indian Penal Code.

*Held*,—that the conviction was bad, because (1) the writing of B's name by his son did not, under the circumstances, constitute a false entry or a false statement, and (2) there was no intention that it should appear in evidence in any proceeding.

*King-Emperor, v. Po Shin* ...

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FALSE INFORMATION TO SCREEN OFFENDER—*See* JOINDER OF CHARGES ...

FALSE TRADE-MARK—*use of receptacle bearing trade-mark—intent to defraud—Indian Penal Code, ss. 480 482.*

A sold illuminant kerosene oil of his own refining in tins originally issued with oil of the same description by B and bearings B's trade-mark. The tins had been altered in minor particulars, and paper labels indicating the true manufacturer of the oil had been affixed. The bodies of the tins, however, on which B's trade-mark appeared, remained unaltered.

*Held*,—that A had committed an offence punishable under section 482 of the Indian Penal Code.

*Nemi Chand v. Wallace* (1907) I.L.R., 34 Cal., 495, referred to.

*King-Emperor v. Po Saung* ...

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FINE— <i>release on security—suspension of sentence of imprisonment in default of payment of fine—distress-warrant—Criminal Procedure Code, 1898, s. 388 (1).</i>	
A sentence of imprisonment in default of payment of a fine cannot be suspended unless a distress-warrant for the levy of the fine is issued at the same time.	
<i>King-Emperor v. The Mya</i>	151
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FINGER-PRINTS— <i>finger impression slip—proof of previous conviction—identification—certificate of officer in charge of Finger-print Bureau—admissibility in evidence</i>	
The accused was charged with theft after three previous convictions under Chapter XVII of the Indian Penal Code. To prove these convictions, which the accused denied, certain "Finger Impression Slips" were produced, together with statements signed by the officer in charge of the Finger print Bureau to the effect that the impressions, appearing thereon were those of the person against whom the specified convictions had been had. An officer of the Finger-print Bureau took impressions of the accused's fingers in Court and identified him as the person whose finger-prints appeared on the "finger Impression Slips."	
<i>Held</i> ,—that the previous convictions of the accused stated on the slips were not proved merely by the production of such slips.	
<i>Hulost v. King Emperor</i>	125
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FIRM, SUIT ON BEHALF OF OR AGAINST— <i>partners—agent—names of parties in proceedings.</i>	
A firm cannot sue or be sued, but the partners in a firm can. The recognized agent of a party is not, as such, a party himself. The Courts must be careful to enter the names of parties correctly in all proceedings, and especially in judgments and decrees. Neglect of such points may cause much confusion and cause needless expense and delay to litigants.	
<i>Mutlu Raman Chetty v. Myat Nyein</i>	23
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<p>A sold certain immoveable property to B, his brother, by registered deed about the time that he was being pressed for payment of a debt due to C. Subsequently to the sale, C obtained a decree against A for the amount of the debt. C thereupon brought a suit against B for a declaration that the property in question was the property of A, alleging that the sale was a fraudulent one effected for the purpose of preventing C from realizing the debt.</p> <p><i>Held</i>,—that the circumstances afforded sufficient ground for finding that A had sold the property to defeat C's claim, and that the burden lay upon B of proving that he had bought the property in good faith and for adequate consideration.</p> <p><i>Bhagwant Appaji v. Kedari Kashinath</i>, (1900) I.L.R. 25 Bom., 202, referred to.</p> <p><i>Amarchand v. Jethubhai Gokul Bapu</i> (1902) 5 Bom. L.R., 142, followed.</p>	
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<i>Held, further</i> ,—that regard being had to the meaning of the word "passengers" used in the definition of hackney-carriage in section 2 of the Act, and in the absence of anything to show on what terms the accused intended to let out the carriages for hire, he could not be convicted of an offence under the Act, even if he were proved to have possessed the carriages.	
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HIGH COURT, DUTY OF, IN REVISION—illegal joinder charges—misjoinder— <i>Criminal Procedure Code</i> , ss. 233, 234, 439.	
The accused was tried at one trial for committing 11 different offences of the same kind.	
<i>Held</i> ,—that although the joinder of charges was illegal and the conviction therefore bad the High Court was not bound to interfere in revision as the accused did not appear to have been prejudiced by the misjoinder, but had pleaded guilty and had made no application for revision.	
<i>Queen-Empress v. Abbas Ali</i> (1896) I.L.R. 25 Cal., 512; P.J. L.B., 437; <i>Kedar Nath Chatterjee v. King-Emperor</i> 5, C.W.N., 897; <i>Queen-Empress v. Muhammad Saeed Khan</i> , (1898), I.L.R. 21 All., 113; <i>Queen-Empress v. Soshi Bhushan</i> , (1893) I.L.R. 15 All., 210; <i>Crown v. Po Lu</i> , I.L.B.R., 357; <i>Kotamraju Venkataroyadu I Weir's Criminal Rulings</i> , 538a, 4th edition; <i>Regina v. Toshack</i> , 4 Cox, Cr. C., 38; <i>Queen-Empress v. Vithal Narayan</i> , I.L.R. 30 Bom., 515, Note; <i>Subrahmanya Ayyar v. King-Emperor</i> , (1901) I.L.R. 25 Mad., 61; referred to.	
<i>King-Emperor v. Yena</i> , 4 L.B.R., 49; <i>Ala Dya v. King-Emperor</i> , 41 Punjab Record Crl., Jts., 11; followed.	
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—omission to examine the accused— <i>Criminal Procedure Code</i> , 1898, ss. 342, 439 (5).	
It is not imperative on the High Court to set aside every void order that comes to its notice, when the person aggrieved does not move the Court to do so.	
Where certain persons were convicted without being duly examined under section 342 of the Criminal Procedure Code, but it nevertheless appeared from the record that they had not been prejudiced by the omission, and they had not appealed although an appeal lay—	
<i>Held</i> ,—that though the conviction was bad it was not necessary for the High Court to set it aside.	
<i>King-Emperor v. Kyan Baw</i> , 2 L.B.R., 239, distinguished.	
<i>King-Emperor v. Yena</i> , 4 L.B.R., 49 referred to.	
<i>Crown v. Po Maing</i> I.L.B.R., 362, followed.	
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HIGH COURT, POWER OF, IN REVISION— <i>Criminal Procedure Code</i> , s. 439.	
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<i>Emperor v. Bahinu</i> , (1902) 5 B. m., L.R., 25, followed.	
<i>In-re Annaipurnabai</i> , (1877) I.L.R., 1, Bom. 630; <i>In the matter of the petition of Basudeb Surma Gossain</i> (1887) I.L.R. 14 Cal., 834; referred to.	
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HIGH COURT, POWERS OF, IN REVISION *disputes as to immoveable property—moveable property—Criminal Procedure Code, 1898, Chapter XII, s. 435 (3).*

Sub-section (3) of section 435, Code of Criminal Procedure, does not bar the revisional jurisdiction of the High Court in a case where an order purporting to be made under Chapter XII of the Code of Criminal Procedure has been made without jurisdiction.

An order purporting to be made under section 145 of the Code of Criminal Procedure, but dealing with moveable property was set aside in revision.

*Raj Chundro v. Po Sein* 2 L.B.R. 239, referred to.

*Roop Lal v. Manjok*, (1898) 2 C.W.N. 572; *Ananda Chandra Bhattacharjee v. Stephen*, (1891) I.L.R. 19 Cal. 127; *Doulat Keer v. Rameswari Koeri*, (1899) I.L.R. 26 Cal. 625; *In the matter of the petition of Nathu Mal* (1902) I.L.R. 24 All. 315; *Isab Mondal v. The Emperor*, (1903) 8 C.W.N. 373; followed.

*Vyavan Chetty v. S.R.M. Meyappa Chetty* ...

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—jurisdiction—revision of Civil Court's order for prosecution—*Criminal Procedure Code, ss. 439, 476.*

The Subdivisional Court acting under section 476 of the Code of Criminal Procedure ordered the prosecution of A for giving false evidence. A thereupon applied for revision of the order to the Sessions Judge, who submitted the proceedings to the High Court with the recommendation that the order should be quashed.

*Held*,—that section 439 of the Code of Criminal Procedure does not confer jurisdiction to interfere with the order of a Civil Court made under section 476.

*A. K. Nur Mahomed v. Aung Gyi*, 3 I.B.R. 234, referred to.

*Ramzan Ali v. Oporno, Charan Chowdry* 4 L.B.R., 138, followed.

*San Gaing v. King-Emperor* ...

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—jurisdiction—revision of Civil Court's sanction to prosecute—*Criminal Procedure Code ss. 195 (6), 439.*

The District Court sanctioned the prosecution of the applicant for giving false evidence. He thereupon applied to the Chief Court on the Criminal Side to revise the order of the District Court in exercise of the powers conferred by section 439 of the Criminal Procedure Code.

*Held*,—that this section did not confer jurisdiction to interfere with the order of a Civil Court.

*Nazir Hasan v. Dost Muhammad*, (1903) I.L.R., 26 All., 1 dissented from.

*Inre Chennuagoud*, (1902) I.L.R., 26 Mad., 139; *Kali Prosad Chatterjee v. Bhuban Mohini Dasi*, (1903) 8 C.W.N., 73; followed.

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Held,—that the Magistrate's procedure was illegal. The evidence established a <i>prima facie</i> case of causing hurt with a <i>da</i> against A and he ought to have been tried for that, instead of for the minor offence of affray.	
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A was adjudicated an insolvent, and entered into a composition deed with certain of his creditors; which was to operate, on compliance with its terms as effectually as an order of final discharge under the Indian Insolvency Act, in respect of the debts due to the assenting creditors. The amount due to each was shown in a schedule to the deed.

B, one of these creditors, subsequently sued A for a sum due on two promissory-notes made in favour of A by C, and negotiated by A with B. The amount due on these notes had not been included as due to B in the schedule to the composition deed or brought to the notice of the other creditors.

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<i>Held</i> ,—that B was therefore debarred from suing A for the amount. <i>Britten v. Hughes</i> , (1829) 5 Bingham. 460, followed. <i>Payler v. Homersham</i> , (1815) 5 Maule & Selwyn, 423, referred to. <i>M. N. N. Raman Chetty v. Abdul Kader and others</i> ... ..	101
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The accused, a hospital assistant, was charged at the trial (a) under section 201 of the Indian Penal Code, with making false reports in respect of the bodies of two murdered men, (b) under section 193, with giving false evidence regarding the two bodies in one deposition before the Magistrate, and (c) under the same section, with giving false evidence regarding the two bodies in one deposition before the Court of Session.	
<i>Held</i> ,—that in the absence of anything to show that the accused's intention was to screen the same person or persons in respect of each of the two murdered men, the acts on which the six charges were based could not be considered to form part of the same transaction. The joinder of the six charges at one trial was therefore illegal, and the trial invalidated.	
<i>Emperor v. Sherufalli Allibhoy</i> , (1902) I.L.R. 27 Bom., 135; <i>Nga Ta Pu v. King Emperor</i> , 2 L.B.R. 19; <i>King Emperor v. Nga To</i> , 2 L.B.R., 23; <i>Subrahmanya Ayyar v. King Emperor</i> , (1901) I.L.R. 25 Mad., 61; followed.	
6 Mad. H.C.R., xvii, (Case No. 13 of 1871) dissented from.	
<i>Nga Lu Maung v. King Emperor</i> , 2 L.B.R., 10; <i>Queen-Empress v. Fakirapa</i> , (1890) I.L.R. 15 Bom., 491; referred to.	
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An entry in Land Records Register IX regarding the transfer of land may be proved under section 35 of the Evidence Act, by the person who made it, if it contains a statement of a fact in issue or relevant fact. But admissions evidenced by such entries, although relevant as against the person making them cannot be proved on behalf of the person making them except as provided by section 21 of the Evidence Act.	
<i>Maung Cheik v. Tha Hmat</i> , 1 L.B.R., 260, referred to.	
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In the case of one of a Burman Buddhist married couple dying, it can rarely, if ever, be necessary that letters of administration to deceased's estate should be granted after the expiry of the period of limitation for the recovery of debts owing to or by the deceased.	
Object of the grant of letters of administration explained.	
The younger daughter of a deceased Burman Buddhist is not, during the lifetime of her mother, a proper person to be granted letters of administration to the estate of her deceased father.	
<i>Ma On and others v. Ko Shwe O and others</i> , S.J., L.B., 378 followed.	
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LIMITATION OF APPEAL— <i>time spent in prosecuting appeal in wrong Court—due diligence—good faith—Limitation Act, 1877, s. 14.</i>	
A appealed to the Chief Court against a judgment passed by the District Court. It was held that the appeal lay to the Divisional Court. On being presented in that Court it was dismissed as time-barred. A then appealed to the Chief Court against the order of dismissal. It was argued that the time spent in prosecuting the appeal in the Chief Court should be excluded under section 14 of the Limitation Act. But it appeared that A's counsel, at the time of advising her to appeal to the Chief Court, had not had explained to her the course of previous litigation which had a bearing on the question of valuation.	
<i>Held</i> ,—that A, having failed to prove that she had put her counsel in possession of all the facts, had failed to prove that she acted with due care and attention; and that she had therefore not shown that she had prosecuted the appeal in the Chief Court in good faith within the meaning of section 14.	
<i>Krishna v. Chalthappan</i> , (1889) I.L.R. 13 Mad., 269; <i>Sarat Chander Bose v. Saraswati Debi</i> , (1907) I.L.R. 34 Cal., 216; <i>Kura Mal v. Ram Nath</i> , (1906) I.L.R. 28 All., 414; referred to.	
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MAHOMEDAN LAW—"death illness"— <i>gif. made under sense of imminence of death—validity of gift of undivided shares in freehold property and Shares in companies—mushua—Privy Council—practice—concurrent finding of fact—discussion of evidence.</i> A, a Mahomedan resident of Rangoon, who died on May 16th, 1902, had executed certain deeds of gift on April 2nd, 1902, by which he conveyed to certain of his minor children and wives a certain number of undivided 2,000th shares in certain properties, which comprised shares in companies and freehold property in Rangoon. It was contended that these deeds were invalid on two main grounds, firstly because they had been executed during a "death illness" under pressure of the sense of the imminence of death, and secondly because such gifts were forbidden by the law of <i>mushua</i> . On the first contention there were concurrent findings of the Original and the first Appellate Courts to the effect that although A was ill at the time of the execution of the deeds, death was not then imminent. <i>Held</i> ,—that it would be inappropriate that the Privy Council, in reviewing concurrent judgments on a pure question of fact such as this, should de-discuss the evidence in detail; and that that the findings of the lower Courts were justified. The doctrine of <i>mushua</i> , on which the second contention was based, prohibits gifts of undivided shares of what is divisible. <i>Held</i> ,—that, assuming the doctrine to apply to the succession of Mahomedan resident in Rangoon, it ought not to be applied to shares in companies and to freehold property in a great commercial town, in view of the very different subjects of property to which it applied in its origin. <i>Sheikh Muhammad Muntaz Ahmad v. Zubaida Jan</i> , (1889) 16 I.A., 205, followed. <i>Mussumat Labbi Bee v. Mussumat Bibhun Bee</i> , 6 N.W.P., H.C. 159; <i>Hassarat Bibi v. Glam Jaffar</i> , (1898) 3 C.W.N., 57; <i>Nawab Umjad Ally Khan v. Mussumat Mohandee Begum and Mussumat Nawab Begum</i> , <i>Afsul Muhul and others</i> , (1867) 11 Moore I.A., 517; <i>Ameeroonissa Khatoon v. Abedoonissa Khatoon</i> , (1874) L.R. 2 I.A., 87; <i>Mullick Abdool Guffoor v. Muleka</i> , (1884) I.L.R. 10 Cal., 1112; <i>Mahomed Buksh Khan v. Hosseini Bibi</i> , (1888) I.L.R. 15 Cal., 684, p. 701; <i>Baker Ali Khan v. Anjuman Ana Begum</i> , (1903) 7 C.W.N., 465; <i>Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdry</i> , (1894) 22 I.A., 76, p. 85; <i>Ranee Khujur onissa v. Mussumat Roushun Jehan</i> , (1876) L.R. 3 I.A., 291; <i>Fatima Bibee v. Ahmad Baksh</i> , (1903) I.L.R., 31 Cal., 319; <i>Ebrahimhai v. Fulbai</i> , (1902) I.L.R. 29 Bom., 577; referred to. <i>Ebrahim Goolam Ariff v. Saiboo</i>	154
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—RELIGIOUS TRUST—appointment of female as trustee—discretion of Court—claims of lineal descendants. A decree made by consent of parties in the High Court at Calcutta on appeal from the Court of the Recorder of Rangoon directed that the trustee of a Mahomedan religious trust should retire, "and that a new trustee be appointed in his place by the Chief Court of Lower Burma, preference in such appointment being given to the lineal descendants of the settlor."	



	<i>Page.</i>
The settlor was a Mahomedan of the Shiah sect. Appellant, his daughter, although not an orthodox Mahomedan but a Babi, was appointed trustee on the Original Side of the Chief Court.	
On appeal to the Appellate Side of the Chief Court it was held that though appellant was not disqualified either by her sex or by her religious belief from holding the trusteeship, neither she nor the other lineal descendants of the settlor were suitable persons to be appointed. The appointment was therefore set aside.	
<i>Held</i> ,—that the authorities conferred no absolute right to the trusteeship on the lineal descendants of the settlor, who had not prescribed any line of devolution; and, that, although appellant's sex did not disqualify her, the Chief Court had, under the terms of the decree of the Calcutta High Court, a discretion in making the appointment, and that, under the circumstances, it was properly exercised.	
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<i>Ma The v. Maung Tha E</i> , 1 U.B.R. (1897—1901), 104, referred to.	
<i>Pwa Thin v. Ba Win</i> ...	146
GROUND FOR REFUSING ORDER FOR— <i>Buddhist Law: Husband and wife—polygamy—refusal to live with husband and second wife—Criminal Procedure Code, s. 488.</i>	
Where a Burman Buddhist has taken a lesser wife without the consent of his chief wife, the refusal by the chief wife to live with her husband in the same house with the lesser wife does not necessarily deprive her of her right to maintenance under section 488 of the Code of Criminal Procedure.	
<i>Ma The v. Maung Tha E</i> , 1 U.B.R. (1897—1901), 104; <i>Maung Kin v. Ma Hnin Yi</i> , S.J., L.B., 114; <i>Ma In Than v. Maung Saw Hla</i> , S.J., L.B., 103; <i>Maung Kauk v. Ma Han</i> , 1 Chan Toon's L.C., 98; 2 U.B.R. (1892—96), 48; <i>Po Nyun v. Ma Su</i> , Criminal Revision No. 1318 of 1906 of this Court (unreported); <i>Maung San Hla v. Ma On Bwin</i> , 2 L.B.R., 46; referred to.	
<i>Pwa Thin v. Ba Win</i> , L.B.R., 146; overruled.	
<i>Ma Ka U v. Po Saw</i> ...	340
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MARRIAGE— <i>presumption of marriage from cohabitation with habit and repute—nature of repute—customs regarding relations of sexes.</i>	
The general presumption of marriage arising from cohabitation with habit and repute will only apply where there is a body of neighbours or some sort of public among whom the repute can arise.	
In view of the nature of Oriental customs regarding the relations between the sexes, it is especially necessary, before drawing the presumption above referred to, to consider carefully whether the habit and repute proved is habit and repute of that particular status which constitutes lawful marriage.	
<i>Ma In Than v. Maung Saw Hla</i> , S.J., L.B., 103, referred to.	
<i>Ma Wun Di v. Ma Kin</i> ...	175
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MISCHIEF—wrongful loss—closing of watercourse—diminution of supply of water for agricultural purposes—use of water—Indian Penal Code, ss. 23, 430.	
A closed a watercourse without obtaining any permission to do so, and thereby diminished the supply of water received by certain fields belonging to B lower down the watercourse. He was convicted of mischief under section 430 of the Indian Penal Code.	
Held,—that as there was nothing on the record to show that B had any legal right to the water intercepted by A, it was not proved that B's loss was wrongful, and the offence of mischief was therefore not established.	
Tung Aung v. King-Emperor	149
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It is not necessary for the holder of a mortgage decree to attach the property which forms the subject of the decree. Where such

property had been unnecessarily attached by the decree-holder, it was held that an application for removal of the attachment, under section 278 of the Code of Civil Procedure, could not be admitted. <i>Deefholts v. Peters</i> , (1887) I.L.R. 14 Cal., 631, followed.	
<i>Gobalu v. Po Hla</i> ... ..	82
<b>MORTGAGE DECREE—suit for redemption—application for possession—execution of decree—Limitation Act, 1877, Schedule II, articles 178, 179—Transfer of Property Act, 1882, ss. 89, 93—Code of Civil Procedure, Schedule IV, forms 128, 129.</b>	
An application to be put in possession of mortgaged property under the decree passed in a suit for redemption is not an application for execution of a decree within the meaning of article 179 of Schedule II of the Limitation Act, and is not governed by any of the provisions of that Act.	
<i>Thakur Prasad v. Fakir Ullah</i> , (1894) I.L.R. 17 All., 106; <i>Narayana Nambi v. Poppi Brahmani</i> , (1866) I.L.R. 10 Mad., 22; <i>Chintaman Damodar Agashev. Balshastri</i> , (1891) I.L.R. 16 Bom., 294; <i>Sasivarna Tevar v. Arulanandam Pillai</i> , (1897) I.L.R. 21 Mad., 261; <i>Puran Chand v. Roy Radha Kishen</i> , (1891) I.L.R. 19 Cal., 132; referred to.	
<i>Tiluck Singh v. Parotein Proshad</i> (1895) I.L.R. 22 Cal., 924; <i>Pramatha Chandra Roy v. Khelra Mohan Ghose</i> , (1902) I.L.R. 29 Cal., 651; <i>Hatem Ali Khundkar v. Abdul Gaffar Khan</i> , (1903) 8 C.W.N., 102; followed.	
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<b>MUNICIPAL COMMITTEE, ORDER OF—fine for continuing disobedience of order after conviction—authorization of Municipal employee to make complaint—form of complaint—Burma Municipal Act, 1898, ss. 180 (1), 195.</b>	
Accused was ordered under section 130 of the Burma Municipal Act to vacate the house he occupied. The order not being complied with, he was prosecuted under section 180 (1), convicted, and sentenced to pay a fine. He was also ordered by the Magistrate to move out within five days, failing which he was to pay a fine of Rs. 5 for every additional day of disobedience.	

*Held*,—that the Magistrate had no authority to modify the order of the Municipal Committee by allowing the accused to disregard it for five days.

*Held, also*,—that the Magistrate had no power to inflict a fine contingent on future events. In the event of the disobedience of the order continuing after the date of the conviction, the proper course would be for the Committee to prosecute the accused again. If convicted, he could then be fined Rs. 5 for every day the disobedience had continued, down to the date of the second conviction.

A complaint of an offence under the Municipal Act must be made by the Committee or by some person authorized by the Committee. Form at foot of complaint considered.

*King-Emperor v. Po Nan* ... .. 44

MUNICIPAL COMMITTEE, ORDER OF—*Uninhabitable premises—prosecution—challenge of legality of order—decision as to fitness of premises for use—Burma Municipal Act, ss. 130, 147, 180.*

A was ordered by the Municipal Committee, under section 130 of the Burma Municipal Act, to refrain from using certain premises which were considered to be unfit for human habitation, until the Committee was satisfied of their fitness for use. He carried out some repairs, but let the premises to a tenant before doing all that the Committee considered necessary. He was prosecuted and convicted, under section 180 of the Act, of disobedience of the order, the Magistrate holding that, by virtue of section 147, the propriety or legality of the order could only be questioned in an appeal to the Commissioner. A applied to the Chief Court for revision.

*Held*,—that the words "no such order shall be liable to be called in question otherwise than by such appeal," in section 147, of the Act, do not debar an accused person from pleading as a defence to a criminal prosecution that the order is *ultra vires*.

*Held, further*,—that that part of the order which required that the Committee should be satisfied as to the fitness of the premises before their use was *ultra vires*. The question whether the house had been rendered fit for habitation was not a matter for the Committee's decision, but a question of fact to be decided by the Magistrate on the evidence.

*J. F. Bretto v. Rangoon Municipal Committee* ... .. 144

MUNICIPAL EMPLOYEE, AUTHORIZATION OF, TO MAKE COMPLAINT—*Burma Municipal Act, 1898, s. 195.—See MUNICIPAL COMMITTEE, ORDER OF—* ... .. 44

MURDER—*culpable homicide—intention—nature of injury—Indian Penal Code, ss. 299, 300 (2), 304.*

A attacked his mother-in-law, Y, a woman of 55, with a *da*, but by mistake cut another woman, Z, on the arm. Z, who was 61 years of age, died from the effects of the wound, although the Civil Surgeon considered that the injury was not sufficient in the ordinary course of nature to cause death to a woman of her age.

The Sessions Judge considered that the second clause of section 300 of the Indian Penal Code was applicable on account of Y's age.

*Held*,—that this clause was not applicable, because (1) as the injury was actually caused to Z although intended for Y, Y's age did not affect the question at all, and (2) in view of the medical evidence and of the fact that the injury was not on a vital part of the body, A could not be held to have intended such bodily injury as he knew to be likely to cause the death of either Y or Z, or such bodily injury as was likely to cause death. He was consequently only liable to sentence under the second part of section 304, Indian Penal Code.

*Shwe Ein v. King-Emperor*, (1905) 3 L.B.R., 122; *Po Tu v. King-Emperor*, (1908) 4 L.B.R., 306; referred to.

*Ban U v. King-Emperor* ... .. 367

MURDER—*culpable homicide—intention of causing such bodily injury as offender knows to be likely to cause the death of the person injured—Indian Penal Code, s. 300 (2).*

The second clause of section 300 of the Indian Penal Code only applies in special cases where the person injured is in such a condition or state of health that his or her death would be likely to be caused by an injury which would not ordinarily cause the death of a person in sound health, and where the person inflicting the injury knows that owing to such condition or state of health it is likely to cause the death of the person injured.

*Shwe Ein v. King-Emperor*, 3 L.B.R., 122, referred to.

*Nga Maung v. King-Emperor* ... 132  
—*nature of injury caused—means of ascertaining intention of accused—Indian Penal Code, s. 300.*

A cut Z on the head with a heavy chopper, slicing off a bit of the frontal bone and cutting the brain. Z died from the effect of the injury, but the medical evidence showed that the wound was not certain, although likely, to cause death.

*Held*,—that A's intention must be inferred not merely from the actual consequence of his act, but from the act itself; and as the natural consequence of an act of the kind in question would be death, A must be presumed to have intended to cause death.

*Shwe Ein v. King-Emperor*, 3 L.B.R., 122, referred to.

*Po Tu v. King-Emperor* ... 306.

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ORAL AGREEMENT ADDING TO TERMS OF DOCUMENT— <i>admissibility in evidence—degree of formality of document—petition-writer—lawyer— registration—mortgage of stock-in-trade—Indian Evidence Act, 1872, s. 92, proviso (2).</i>	
A mortgaged certain shops and their stock-in trade to B. The mortgage deed, although registered, was drawn up, not by a lawyer, but by a petition-writer. B alleged an oral agreement that the mortgage should include goods which might be brought into the shops subsequent to the date of the mortgage. The terms of the deed were found to be not inconsistent with such an agreement.	
<i>Held</i> ,—that in considering the degree of formality of the document, the fact that it was not drawn up by a skilled lawyer was of much greater importance than the fact of its being registered. Evidence of the oral agreement was held to be admissible under proviso 2 to section 92 of the Evidence Act.	
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ORDER DISMISSING SUIT FOR DEFAULT— <i>decree—application to set aside dismissal of suit—deposit in Court or security—Civil Procedure Code, ss. 2, 102, 103—Provincial Small Cause Courts Act, 1887, s. 17 (1).</i> An order dismissing a suit under section 102 of the Code of Civil Procedure does not involve the making of a "decree" within the meaning of section 2 of the Code. The proviso to sub-section (1) of section 17 of the Provincial Small Cause Courts Act, which requires an applicant for an order to set aside a decree <i>ex parte</i> to deposit the amount due or to give security, does not apply to it. <i>Mansab Ali v. Nihal Chind</i> , (1893) I.L.R. 15 All., 359; <i>Chand Kour v. Patab Singh</i> , (1888) I.L.R. 16 Cal. 98; <i>Gilkinson v. S. Ayyar</i> , (1898) I.L.R., 2 Mad., 221; followed. <i>Ramachandra Pandurang Naik v. Madhav Purushottam Naik</i> , (1891) I.L.R., 16 Bom., 23; <i>Radha Nath Singh v. Chand Churn Singh</i> , (1903) 7 C.W.N., 486; <i>Bahadur Panday v. Phool Chand Gajamuk</i> , Civil Miscellaneous No. 189 of 1889; <i>Radha Nath Singh v. Chand Charan Singh</i> , (1903) I.L.R., 30 Cal., 660; dissented from. <i>Maharaja Dhiraj Maharana Shir Mansingji v. Mehta Harihararam Natharram</i> , (1894) I.L.R. 19 Bom., 307; <i>Anwar Ali v. Jaffer Ali</i> , (1896) I.L.R. 23 Cal., 827; <i>Jagannath Singh v. Budhan</i> , (1895) I.L.R. 23 Cal., 115; <i>Williams v. Brown</i> , (1886) I.L.R. 8 All., 108; <i>Lekha v. Bhauna</i> , (1895) I.L.R. 18 All., 101; <i>Mussummat Jamina Bibi v. Seri Chand Bhagat</i> , (1898) 2 C.W.N., 693; referred to. <i>Maneck Bai v. P. L. S. A. Moothia Chetty</i> ...	17
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ORDER FOR DISPOSAL OF PROPERTY— <i>See DISPOSAL OF PROPERTY, ORDER FOR—</i> ...	
ORDER FOR DISPOSAL OF PROPERTY BY CRIMINAL COURT— <i>Criminal Procedure Code, s. 517—pledge of goods received in pawn in good faith from person in possession—possession obtained by fraud—Indian Contract Act, 1872, s. 178, proviso 2.</i> B asked A for some jewels promising to sell them for A, or, if not sold, to return them the same evening. A was induced by this promise to hand the jewels to B. Instead of selling them, B pawned them the same day for about a third of their value, and then disappeared for four days. On being prosecuted she pleaded guilty to a charge of criminal breach of trust under section 406 Indian Penal Code, and stated that she had pawned the jewels because she was pressed for money by a creditor. The Magistrate at the close of the trial ordered the jewels to be returned to A. <i>Held</i> ,—that the circumstances were sufficient to constitute at least a <i>prima facie</i> case of fraud within the meaning of the second proviso of section 178, Indian Contract Act, on the part of B in obtaining the jewels. The order of the Magistrate for the return of jewels was therefore upheld. <i>Keng Lone v. Ma Kay</i> ...	13
...— <i>Criminal Procedure Code, s. 517—pledge of goods received in pawn in good faith from person in possession—question for Civil Court—Indian Contract Act, 1872, s. 178.</i> A entrusted some jewels to B to sell for him. B did not sell them, but gave them to her niece C, who pawned them to D. B was convicted of criminal breach of trust, and the Magistrate ordered the jewels to be returned to A. <i>Held</i> ,—that the question whether section 178, Indian Contract Act,	



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applied in view of the fact that the jewels were pawned by C and not by B and whether the circumstances were such as to bring the transaction within the first proviso to that section, were matters to be decided by a Civil Court. As A had given the jewels to B to be disposed of for money, and as they had been so disposed of, he was not entitled to relief in a Criminal Court. The Magistrate's order was set aside and the jewels were ordered to be returned to D.	
U Kyi v. Maung Pe, Criminal Revision No. 1130 of 1905 (unreported); Naganada Davey v. Bappu Chettiar, (1903) I.L.R. 27 Mad., 424; Greenwood v. Holquette, 12 Ben. L.R., 42; referred to. Stephen Avel v. King-Emperor and D. Manual	25
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The accused was convicted of an offence under the Burma Municipal Act and sentenced to pay a fine of Rs. 20 by a first class Magistrate. He applied for revision to the Sessions Judge, who treated the application as an appeal and reversed the conviction, although no appeal lay and the order was not one that he could have passed in revision.	
Held,—that as the Sessions Judge was not authorized by law to try the appeal, his order was void, but—	
Held, further,—that an order which is void for want of jurisdiction must nevertheless be regarded as valid unless and until it is set aside by a Court of competent jurisdiction.	
Held, further,—that it is not imperative on the High Court to set aside in every case an order of acquittal or discharge made on appeal by a Court without jurisdiction.	
Queen-Empress v. Husein Gaibu, (1884) I.L.R. 8 Bom., 307; Empress v. Alim Mundle, (1882) 11 C.L.R., 55; dissented from. Queen v. Unnath Bundhoo Banerjee, (1874) 21 W.R., 37; referred to. King-Emperor v. Yena	49
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The taking part in gambling by the house owner or occupant himself may be, and often is, a part of the method of conducting or of assisting in conducting the business of a common gaming-house, and may also be a part of the way in which a house is used as a common gaming-house for the profit or gain of the owner or occupier.	
A house-owner, therefore, who used her house as a common gaming-house, and at the same time took part herself in the unlawful card-playing therein, was held to be only liable, by virtue of section 71 of the Indian Penal Code, to one sentence, <i>viz.</i> , under section 12 of the Burma Gambling Act, although she was liable to convictions under both section 11 and section 12.	
<i>Crown v. Shue Pe and others</i> , 1 L.B.R. 178, overruled.	
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The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrues due to the partnership in the lifetime of the deceased.	
<i>Ram Narain Nursing Doss v. Ram Chunder Jankeedoll</i> , (1890) I.L.R. 18 Cal., 86, dissented from.	
<i>Vaidyanatha Ayyar v. Chinnaasami Naik</i> , (1893) I.L.R. 17 Mad., 108; <i>Subramanian Chetty v. Rakku Servai</i> , (1897) I.L.R. 20 Mad., 232; <i>Jagmohandas Kilas Bhai v. Altunaria Duskol</i> , (1894) I.L.R. 18 Bom., 338; referred to.	
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A plaintiff who has obtained leave to sue <i>in formâ pauperis</i> , and has been successful in obtaining a decree for a portion of his claim but has failed as to the remainder, may be allowed, under section 561 of the Code of Civil Procedure, to take <i>in formâ pauperis</i> any objection to the decree which he could have taken by way of appeal. The provisions of Chapter XLIV of the Code, so far as they can be made applicable, now apply to an objection under this section.	
<i>Babaji Hari v. Rajaram Ballal</i> , (1875) I.L.R. 1 Bom., 75; <i>Narayana v. Krishna</i> , (1889) I.L.R. 8 Mad., 214; <i>Brejeshwari Dasi v. Guroo Churn Das</i> , (1885) I.L.R. 11 Cal., 735; distinguished.	
<i>Po Hlaing v. Ma O</i> ... ..	262

**PAWN-BROKER—taking in pawn—Indian Contract Act, Chapter IX.**

The law relating to pawning and pawn-brokers in this country is to be found in Chapter IX of the Indian Contract Act. Under the provisions of this chapter the receipt of goods as security for a loan constitutes a "taking in pawn" even though no fixed time be agreed on for the repayment of the loan.

A person cannot be held to be a pawn-broker unless it is proved that he habitually carries on the business of lending money on the security of goods pledged with him, and that he holds himself out to lend money on such security.

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POSSESSION OF OPIUM NOT PURCHASED FROM GOVERNMENT— <i>illegal possession of opium—presumption from evidence—Opium Act, ss. 9 (c), 10.</i>	
The accused was found in possession of three tolas of opium five days after his last purchase of that amount recorded on his consumption slip. The Magistrate presumed that he must have consumed half a tola a day, and that therefore the three tolas in his possession could not be opium purchased from Government. The defence was that accused had consumed only opium borrowed from friends in the meanwhile.	
<i>Held</i> ,—that the Magistrate's presumption was not justified.	
<i>King-Emperor v. Paw Yan</i> ...	314
POWER OF COURT TO CANCEL APPOINTMENT OF RECEIVER— <i>refusal to hand over property to Receiver—inquiry regarding property to be handed over to Receiver—enforcement of order of Receiver—temporary injunction—Civil Procedure Code, ss. 108, 492, 493, 503.</i>	
A Court which has passed an order appointing a Receiver in any case has power subsequently to hold an inquiry as to whether the order should remain in force or not, and if necessary to cancel the order. Where a Receiver has been appointed and any person refused to hand over property to him, the proper course is for the Court to hold an inquiry as to the possession of the property in question and as to whether it is property that should be handed over to the Receiver, before issuing an injunction under section 492, Code of Civil Procedure, unless it appears that the object of the injunction would be defeated by the delay.	
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POWER OF LOCAL GOVERNMENT TO SPECIFY COURT OF TRIAL OF PUBLIC SERVANT—*local jurisdiction—Magistrate—Criminal Procedure Code, 1898, ss. 197, 597.*

The Local Government, acting under section 197 of the Code of Criminal Procedure, sanctioned the prosecution of A, a public servant, for an offence committed in Upper Burma, and specified the Court of a Magistrate in Lower Burma as that before which the trial was to be held.

*Held*,—that the Magistrate so specified had power to take cognizance of the offence, although it was alleged to have been committed within the local jurisdiction of the Judicial Commissioner of Upper Burma, while the Magistrate's own jurisdiction was within the limits of the jurisdiction of the Chief Court of Lower Burma.

*Queen-Empress v. Samavir* (1893) I.L.R. 16 Mad., 468, *Po Wa v. King-Emperor*, Criminal Revision No. 787 of 1905 (unreported); referred to.

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POWER OF MAGISTRATE TO ORDER PROSECUTION OF OFFENDER NOT ARRESTED BY POLICE—*first information report—final report—Criminal Procedure Code, 1898, ss. 157, 159, 169, 170, 173, 190, (1) (c).*

In a case sent up by the police, the Magistrate acquitted the accused, but ordered that another person should be sent up for trial. The Magistrate was not empowered under section 190 (1) (c) of the Criminal Procedure Code to take cognizance of offences of his own motion.

*Held*,—that the Magistrate, although not so empowered, was competent to order the prosecution of any person implicated on receipt of the first information report from the police, and *a fortiori* after having received the final report and having himself examined witnesses.

*King-Emperor v. Nga Po Thin*, 2 L.B.R., 146, referred to.

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POWER OF MAGISTRATE TO WHOM A CASE IS SUBMITTED FOR RELEASE ON PROBATION—*Criminal Procedure Code, ss. 380, 562,—See SECURITY TO KEEP THE PEACE, ORDER FOR—* ... ..

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PRELIMINARY ORDER BEFORE COMPLETION OF EVIDENCE—*judgment—change of Judge—findings of predecessor—Civil Procedure Code, ss. 191, 198.*

The suit was tried in the District Court partly by one Judge and partly by another. In a preliminary order the first Judge came to

certain findings, and directed that after evidence on certain points had been taken, the final decree should take a certain shape. The Judge who finished the case varied certain of his predecessor's findings in the final judgment.	
<i>Held, per Fox, C.J.</i> ,—that the first Judge had no authority to give judgment before the completion of the evidence, and it was for the second Judge to give the judgment on which the decree should be based, and open to him to deal with the whole case.	
<i>Per Hartnoll, J.</i> ,—that the order of the first Judge did not have the force of a decree, and that the decree of the second Judge which decided the suit was the decree that was appealable.	
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PREVIOUSLY CONVICTED OFFENDER, TRIAL OF, BY SECOND CLASS MAGISTRATE— <i>power of reference for higher punishment—Criminal Procedure Code, ss. 348, 349.</i>	
A was tried by a second class Magistrate for an offence for which he was liable, by reason of a previous conviction, to enhanced punishment under section 75 of the Indian Penal Code. The Magistrate, being of opinion that he was guilty, but that he could not pass an adequate sentence himself, referred the case under section 349 of the Code of Criminal Procedure to the Subdivisional Magistrate, who sentenced him to two years' rigorous imprisonment and a whipping.	
<i>Held</i> ,—that as the case was one to which section 348 of the Code of Criminal Procedure applied, the Magistrate was debarred from referring the case for higher punishment under section 349.	
<i>King-Emperor v. Hla Gyi, 2 L. B. R., 285</i> , referred to.	
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A, a Mahomedan resident of Rangoon, who died on May 16th, 1902, had executed certain deeds of gift on April 2nd, 1902, by which he conveyed to certain of his minor children and wives a certain number of undivided 2,000th shares in certain properties, which comprised shares in companies and freehold property in Rangoon. It was contended that these deeds were invalid on two main grounds, firstly because they had been executed during a "death illness" under pressure of the sense of the imminence of death, and secondly because such gifts were forbidden by the law of <i>mushua</i> .	
On the first contention there were concurrent findings of the original and the first appellate Courts to the effect that although A was ill at the time of the execution of the deeds, death was not then imminent.	
Held,—that it would be inappropriate that the Privy Council, in reviewing concurrent judgments on a pure question of fact such as this, should de-discuss the evidence in detail; and that the findings of the lower courts were justified.	
The doctrine of <i>mushua</i> , on which the second contention was based, prohibits gifts of undivided shares of what is divisible.	
Held,—that, assuming the doctrine to apply to the succession of Mahomedan resident in Rangoon, it ought not to be applied to shares in companies and to freehold property in a great commercial town, in view of the very different subjects of property to which it applied in its origin.	
Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan, (1889), 16 I.A., 205, followed.	
Mussumat Labbi Bee v. Mussumat Bibhu Bee Bee, 6 N.W.P. H.C., 159; Hassarat Bibi v. Golam Jaffar, (1898) 3 C.W.N., 57; Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum and Mussumat Nawab Begum, Afsul Muhul and others, (1867) 11 Moore I.A., 517; Ameerconissa Khatoon v. Abedoonissa Khatoon, (1874) L.R. 2 I.A., 87; Mullick Abdool Guffoor v. Muleka, (1884) I.L.R. 10 Cal., 1112; Mahomed Buksh Khan v. Hossein Bibi, (1888) I.L.R. 15 Cal., 684, p. 701; Baker Ali Khan v. Anjuman Ana Begam, (1903) 7 C.W.N., 465; Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry, (1894) 22 I.A., 76, p. 86; Ramee Khujooroonissa v. Mussamut Ronshun Jehan, (1876) L.R. 3 I.A., 291; Fatima Bibee v. Ahmad Baksh, (1903) I.L.R. 31 Cal., 319; Ebrahimblai v. Fulbat, (1902) I.L.R. 26 Bom., 577; [referred to. Ebrahim Goolam Ariff v. Saiboo	154
—practice—point not raised in Lower Courts.	
Where it was urged that one of the issues framed in the suit was susceptible of a wider construction than had been given to it in the lower Courts, but where the parties themselves, by their conduct in the case, had construed it in the narrower sense, the Privy Council refused to entertain a question arising under the wider construction.	
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A rented and occupied a house owned by B at Thayetmyo. B agreed to sell the house to A free of incumbrances for Rs. 2,000. Rs. 100 was paid by A as earnest-money, and the balance was to be paid on execution of the deed of sale. There were certain mortgages on the house, amounting to more than Rs. 1,900. B failed to clear these off, and the balance of the purchase money remained unpaid. At the end of nearly two years, B sued A for rent from the time of the contract of sale, although no agreement was made that rent should be so payable.	
<i>Held</i> ,—that although section 55 of the Transfer of Property Act was not in force at Thayetmyo, its general principles should be applied; that therefore, as the house was sold free from incumbrances, it was B's duty to discharge the mortgages, and that as he failed to do this A was entitled to retain the amount due on them out of the purchase-money; and consequently that B himself was responsible for the non-payment of the purchase-money, and could not claim rent.	
<i>H. McDonald v. C. B. Willis</i>	224

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REPLY, PROSECUTOR'S RIGHT OF— <i>document put in evidence by defence during cross-examination of prosecution-witness—evidence adduced by accused—Criminal Procedure Code, ss. 289, 292.</i>	
In a Sessions trial before the Chief Court, a copy of a newspaper was handed for reference to one of the prosecution-witnesses during cross-examination by the counsel for the defence, and was thereupon admitted in evidence.	
Held,—that the prosecutor was entitled to reply under section 292, Criminal Procedure Code.	
<i>Queen Empress v. Venkatapathi</i> , (1888) I.L.R. 11 Mad., 339 ;	
<i>Queen-Empress v. Hayfield</i> , (1892 I.L.R. 14 All., 212 ; <i>Queen-Empress v. Moss</i> , (1893) I.L.R., 16 All., 883 followed.	
<i>King-Emperor v. Stewart</i> , (1904) I.L.R. 3 Cal., 1050, referred to.	
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— <i>POWER OF SESSIONS JUDGE IN—further inquiry—specifying class of Magistrate to hold further inquiry—reasons for ordering further inquiry—Criminal Procedure Code, 1898 s. 437.</i>	
The Sessions Judge acting under section 437 of the Code of Criminal Procedure directed the District Magistrate, by himself or by a Special Power Magistrate subordinate to him, to hold further inquiry in the case of an accused person who had been discharged by a Township Magistrate. The accused was subsequently convicted by the Senior Magistrate, and on appeal it was contended that the Sessions Judge should not have ordered further inquiry by a Magistrate other than the Magistrate who had discharged the accused.	

*Held*,—that the Sessions Judge's order was a legal and proper one.

It was further contended that the Sessions Judge had not given reasons for his order. The words used by him were: "I have translated and considered the whole of the evidence on the record, and the conclusion to which I have come is that there must be further inquiry."

*Held*,—that these words showed ample reasons for the order, and that it would have been improper for the Sessions Judge to comment on the evidence in detail.

*Queen-Empress v. Amir Khan*, (1885) I.L.R. 8 Mad., 336; *Chundi Churn Bhattacharjee v. Hem Chunder Banerjee*, (1883) I.L.R. 10 Cal., 207; *King-Emperor v. Po Yin*, 3 L.B.R., 97; referred to. *Nagendra Nath Sen v. Korb*, 8 C.W.N., 456, distinguish.

*Tun Win v. King-Emperor* ...

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REVIVAL OF PROSECUTION IN REVISION—*further inquiry—completion of revived proceedings—Criminal Procedure Code, s. 437.*

When a prosecution is revived by an order in revision under section 437, Criminal Procedure Code, the trial must be brought to a conclusion by the Magistrate holding the revived inquiry in the same way as if the case had been originally instituted before him.

*Queen-Empress v. Papadu*, (1884) I.L.R. 7 Mad., 454, followed.

*King-Emperor v. Hein Kwaing* ...

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ROBBERY—*theft—causing hurt to effect escape—Indian Penal Code, s. 390.*

A stole some rice from a house. While carrying it away he was seized by B. He thereupon dropped the rice and then stabbed B with a knife. He was convicted of voluntarily causing hurt in robbery, under section 394, Indian Penal Code, and appealed to the Chief Court.

*Held*,—that as A dropped the rice before stabbing B, he could not have caused the hurt for the purpose of carrying away the rice and his offence was therefore not robbery. The conviction was altered to one of theft after making preparation for causing hurt under section 382, Indian Penal Code, and of voluntarily causing hurt with a knife under section 324, Indian Penal Code.

*Nga Paing v. King-Emperor* ...

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## S

SALE BY REGISTERED DEED—*verbal sale—notice, equitable doctrines of—specific performance—Indian Registration Act, 1877, s. 48—Specific Relief Act, 1877, s. 27.*

A sold to B by a registered deed land which he had already sold verbally to C. At the time of the second sale B had notice of the previous verbal sale to C. C sued both A and B for either the land or the return of his money.

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<i>Per Hartnoll, J.</i> —When security to keep the peace is demanded under section 106 of the Code of Criminal Procedure, an order should be passed at the time of sentence for the accused's detention in simple imprisonment unless he shall have given the security on or before the expiration of his substantive sentence of imprisonment.	
<i>Queen-Empress v. Harilal</i> , Ratanlal's Unreported Cases, 432;	
<i>Queen-Empress v. Pandu Khandu</i> , Ratanlal's Unreported Cases, 774; referred to.	
<i>Queen-Empress v. Saing Gyi</i> , P.J., L.B., 245, dissented from.	
<i>King Emperor v. Tha Hlaing</i> ... ..	205
SECURITY PROCEEDINGS— <i>preventive sections—order on evidence recorded by predecessor—security for more than one year—submission of proceedings to Sessions Judge—order of Sessions Judge—period of imprisonment in default of security—Criminal Procedure Code, 1898, ss. 118, 123, 350.</i>	
When a Magistrate makes an order under section 118 of the Criminal Procedure Code requiring an accused person to give security for more than one year, the Magistrate himself has no power to pass any order for imprisonment in default of the security being given. He can only issue a warrant for the detention of the accused pending the orders of the Sessions Judge.	
The proceedings in such a case are not laid before the Sessions Judge for confirmation of an order, but for the purpose of his passing an order himself under section 123 (3) of the Criminal Procedure Code. The period for which imprisonment in default of giving security is ordered must coincide with the period for which security is demanded.	
<i>King-Emperor v. Myat Aung</i> ... ..	135
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House-trespass with intent to commit theft is not an offence involving a breach of the peace, and consequently a person convicted of that offence cannot be required to execute a bond for keeping the peace.	
<i>Quere.</i> —Can a Magistrate to whom a case is submitted under the proviso to section 562 of the Criminal Procedure Code pass, under section 380, any order other than a sentence or an order for release on probation?	
<i>Morali v. King-Emperor</i> ... ..	277
SEIZURE OF MONEYS IN COMMON GAMING-HOUSE— <i>entry—forfeiture—Burma Gambling Act, 1899, ss. 6, 11, 12, 15.</i>	
There is no provision in the Burma Gambling Act empowering any person to seize moneys found in a common gaming-house which is not entered under the provisions of section 6, nor authorizing a Magistrate to order that moneys so seized shall be forfeited.	
<i>Ah Shee v. King-Emperor</i> , 3 L.B.R., 229, referred to.	
<i>Po Hla v. King-Emperor</i> ... ..	227
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— <i>transportation and imprisonment—offence punishable with less than seven years' imprisonment—Indian Penal Code, s. 59.</i>	
The accused were sentenced to seven years' transportation under section 307, Indian Penal Code, and to three years' transportation under section 440, Indian Penal Code.	



<i>Held</i> ,—that the sentence of transportation under section 440, Indian Penal Code, was illegal, because (1) section 59, Indian Penal Code, is not applicable in the case of offences punishable with less than seven years' imprisonment, and (2) in cases where section 59, Indian Penal Code, is rightly applied, no sentence of less than seven years' transportation for each offence can be passed. The sentence of three years' transportation was altered to one of three years' imprisonment.	
<i>Queen-Empress v. Gour Chunder Roy</i> , 8 Suth. W.R., 2, followed.	
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The proviso to section 42 of the Specific Relief Act does not apply to a suit for a declaration that property attached and sold in execution of a decree is the property of the plaintiff, even though no application for removal of attachment had been made under section 278 of the Code of Civil Procedure.

*Sevaraman Chetty v. Maung Po Yin*, 1 L.B.R. 1; *Kya Get v. Bu Nwe*, 4 L.B.R. 88; *Supal Panday v. Sukkhu Koiri*, 4 L.B.R. 75; referred to.

*P. L. A. N. Allagappa Chetty v. Nazamat Ali Chowdry* ...

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SUIT FOR DISSOLUTION OF MARRIAGE—*proof of adultery—evidence—service of summons—personal service—advertisement in newspaper—Indian Divorce Act, 1869, ss. 7, 50—Civil Procedure Code, s. 82.*

A suit under the Indian Divorce Act, 1869, for dissolution of marriage on the ground of adultery cannot succeed without convincing evidence in proof of adultery.

Where the only admissible evidence in support of such a suit was to the effect that the wife (respondent) had left her husband and had been seen on two occasions in company with two boys in a house that was not alleged to be a brothel.

*Held*,—that the evidence was insufficient to establish the fact of adultery.

A mere statement by the petitioner that he could not ascertain the respondent's proper address, without proof that reasonable efforts had been made to ascertain it, was held not to be a sufficient ground for dispensing with personal service of summons upon such respondent.

*Shwe Tha v. Ma Saw Hla* ...

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SUIT FOR POSSESSION OF LAND—*defence based on alternative title—specific title—gift—adverse possession.*

It is open to a party to allege a specific title to property, and in the alternative a title by twelve years' adverse possession.

*Goluck Chunder Masanta v. Nundo Coomar Roy*, (1878) I.L.R. 4 Cal., 999, followed.

*Ma Yin v. Ma Pu* ...

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SUIT TO APPOINT TRUSTEE AND RECOVER TRUST PROPERTY—*Civil Procedure Code, s. 537—See* TRUST FOR RELIGIOUS PURPOSES ...

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SUIT TO ENFORCE REGISTRATION—*invalid registration—time limit—mortgage deed—admissibility in evidence—bar to oral evidence—personal undertaking—agreement to repay loan—Indian Registration Act (1877), ss. 17, 23, 34, 49, 73, 77—Indian Evidence Act (1872), s. 91—Transfer of Property Act (1882), s. 86.*

In December 1901 A borrowed money of B and executed a mortgage deed of certain land in B's favour.

In January 1902 B instituted a suit praying, *inter alia*, for an order to the Sub-Registrar to register the deed. In June 1903 he obtained a decree directing that the deed should, on application, be registered whether A admitted execution and receipt of consideration or not.

The deed was registered in accordance with this decree in July 1903.

The present suit was brought by B for sale of the mortgaged property and was based on the mortgage deed in question.

*Held*,—that the former suit not having been brought under the conditions required for the filing of a suit under section 77 of the Indian Registration Act, the decree therein had no value as exempting the

document registered under it from the necessity for compliance with all other provisions of the Act. The Court had power to decide as to the validity of the registration, and as the document was not registered in accordance with the provisions of sections 23 and 24 of the Act, it could not, under section 49, be received in evidence as affecting the mortgaged property. At the same time, section 91 of the Evidence Act precluded B from proving the existence of the mortgage by any other evidence.	
<i>Held, further</i> ,—that as the deed contained a distinct agreement to repay the money borrowed, it was admissible as the basis of a personal money decree for the amount.	
<i>Bhagwan Singh v Khuda Bakish</i> , (1881) I.L.R. 3 All., 397; <i>Edu</i> <i>v. Mahomed Siddik</i> , (1882) I.L.R. 9 Cal., 150; <i>Petherpermal</i> <i>Chetty v. Moonandy Servai</i> , 11 Bur. L.R., 166; <i>Chatter Mal v.</i> <i>Thakuri</i> , (1898) I.L.R. 20 All., 512; followed.	
<i>Ram Ghulam v. Choley Lal</i> , (1878) I.L.R. 2 All., 46; <i>Abdulla Khan</i> <i>v. Jamki</i> , (1894) I.L.R. 16 All., 303; <i>Sahnukhun Lall Panday v.</i> <i>Sah Koondun Lall</i> , (1875) L.R. 2 I.A., 210; <i>Sreemutty Matongny</i> <i>Dossee v. Ramnarian Sadkhan</i> , 2 C.L.R., 428; referred to.	
<i>Maung Kyaw and Ma San Hmwe v. Silhambaram Chetty</i> ...	88
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<i>Ma Dun v. Ma Pa U</i> , 2 L.B.R., 124, distinguished.	
<i>Kya Get v. Bu Nwe</i> ...	88
— <i>right of suit inde-</i> <i>pendent of order on application for removal of attachment—Civil</i> <i>Procedure Code, s. 283.</i>	
Independently of section 283 of the Code of Civil Procedure, a decree- holder who has attached property as being the property of his judgment-debtor, and whose right to do so has been disputed, may sue for a declaration that the property belonged to his judgment- debtor.	
<i>Raghunath Mukund v. Sarosh K. R. Kama</i> , (1898) I.L.R. 23 Bom., 266, referred to.	
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the same transaction. There was therefore no misjoinder of charges.	
<i>Held, further</i> (Irwin, J., dissenting),—that the actual thief is not liable to be convicted of an offence under section 215 in respect of the property which he himself stole. As the facts proved justified the conclusion that the accused were themselves the thieves, the convictions under section 380 were upheld and those under section 215 set aside.	
Where the question is likely to arise whether a person who has accepted a gratification for the return of stolen property is the actual thief or not, alternative charges should be framed under section 236 of the Code of Criminal Procedure.	
<i>King-Emperor v. Nga To</i> , 2 L.B.R., 23; <i>Queen-Empress v. Muhammad Ali</i> , (1900) I.L.R. 23 All., 81; followed.	
<i>Oh Gyi v. Queen-Empress</i> , S.J., L.B., 449; <i>Shwe Kya v. Queen-Empress</i> , S.J., L.B., 461; <i>Queen-Empress v. Tun Byu</i> , P.J., L.B., 226; <i>Crown v. Nga Shein</i> , 1 L.B.R. 203; <i>King-Emperor v. Po Sein</i> , 2 L.B.R., 14; referred to.	
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TRUST DEED— <i>stamp duty on trust deed for securing mortgage debentures—mortgage deed—Indian Stamp Act, 1889, s. 2 (17).</i>	
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A document described as a "Trust Deed for securing Mortgage Debentures" was presented for adjudication under section 31, Indian Stamp Act, and the question of the stamp duty due was referred for decision to the Chief Court by the Chief Controlling Revenue authority. The document was admittedly executed for the purpose of securing money to be advanced by way of loan, but it was argued on behalf of the executants that it could not be regarded as a mortgage deed as it did not itself purport to transfer to and vest in the trustees any interest in the properties specified in it. The trustees were, however, given the *right* to have the properties vested in them to be held by them as trustees for the debenture-holders and as security for the amount to be advanced on the debentures. They were also given the rights of entry, taking possession and management that mortgagees and trustees for debenture-holders are usually given.

*Held*,—that as the document created rights over the property specified in it in favour of the trustees, it was a mortgage deed under the definition contained in section 2, clause 17, Indian Stamp Act.

*Queen-Empress v. Debendra Krishna Mitter*, (1900) I.L.R. 27 Cal., 587; *The United Realisation Company, Limited v. The Commissioners of Inland Revenue*, (1899) I Q.B.D., 361; referred to.

*Financial Commissioner of Burma, reference under section 55, sub-section (1), of the Indian Stamp Act*

TRUST FOR RELIGIOUS PURPOSES— <i>suit to appoint trustee and recover trust property—cause of action—misjoinder—right to sue stranger to trust—heir of trustee—Civil Procedure Code, ss. 28, 43, 45, 539.</i>	2
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B and C were alleged to have been joint trustees with A of a certain religious trust, the funds of which amounted to Rs. 2,300. Of this sum Rs. 2,000 was lent on a promissory-note in the names of A, B and C to D. The balance, Rs. 300, and the promissory-note remained with A. A died, and the money and the promissory-note then passed into the hands of E, his widow and heir. A fresh trustee, F, was appointed, but E refused to make over the property to him. B and C now alleged the Rs. 2,000 was advanced in equal shares by them and by A, and that the shares advanced by them did not come out of the trust funds. In view of their claims, D refused to repay the Rs. 2,000 to the new trustee F.

F, with other persons intersted in the trust, brought a suit against E, B and C for (1) the appointment of a trustee, (2) a declaration that the Rs. 2,000 and the Rs. 300 were trust property, (3) the vesting in the trustee of the Rs. 300 and the papers belonging to the trust, and of the right to sue for the Rs. 2,000 and (4) an order to E to hand over to the trustee the Rs. 300, the promissory-note and other papers belonging to the trust.

The suit was contested on two main grounds of law; the first of these was that the joining of E, B and C as defendants constituted radical misjoinder, inasmuch as the cause of action against B and C was not the same as that against E.

*Held*,—that the plaint disclosed only two real causes of action, namely (1) the appointment of a trustee for the trust funds, and (2) the vesting in the trustee of the property of the trust in the hands of E; that B and C were concerned in the first cause of action as they were themselves members of the congregation interested in the trust; that the loan on the promissory-note did not constitute a cause of action distinct from the claim for the Rs. 300, and that therefore the joining of B and C with E did not constitute misjoinder.



The second ground on which the suit was contested was that so much of it as referred to the recovery of the property of the trust did not fall within the scope of section 539 of the Code of Civil Procedure. Held,—that while section 539 of the Code of Civil Procedure gives no right of suit against strangers to the trust E was not a stranger to it, but herself in trust the property that had come into her hands, as the heir of all the rights and liabilities of A; and that it was sufficient for the purpose of bringing the suit under section 539 that B and C were alleged in the plaint to have been joint trustees with A. Whether they were so or not was a question of fact to be decided on the evidence.	
<i>Narsingh Das v. Mangal Dubey</i> , (1882) I.L.R. 5 All., 163; <i>Mullick Kefait Hossein v. Sheo Pershad Singh</i> , (1896) I.L.R. 23 Cal., 821; <i>Ganesht Lal v. Khairati Singh</i> , (1894) I.L.R. 16 All., 279; <i>Varajial Bhaishanker v. Ramdat Harikrishna</i> , (1901) I.L.R. 26 Bom., 259; <i>Budree Das Mukim v. Chooni Lal Johurry</i> , (1906) I.L.R. 33 Cal., 789; referred to.	
<i>Budh Singh Dudhuria v. Niradbaran Roy</i> , (1905) 2 C.L.J., 431, followed.	
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A mortgage bond containing a personal undertaking, whether express or merely implied, to repay money borrowed is admissible in evidence in a suit to enforce such personal obligation, even though the property mortgaged therein exceed Rs. 100 in value and though the bond be not registered.	
<i>Ma Tha v. Ma Shwe Hnit</i> , (1894) P.J., L.B., 124; <i>Ulfatunnissa v. Hosain Khan</i> , (1883) I.L.R. 9 Cal., 520; <i>Thandavan v. Valli-amma</i> , (1892) I.L.R., 15 Mad., 336; followed.	
<i>Myat Thin v. P.C.V.E. Kasuric Vanthan Chetty</i> ... ..	52
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USE OF RECEPTACLE BEARING TRADE-MARK—Indian Penal Code, s. 480—See FALSE TRADE-MARK ... ..	192
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USEFRUCTUARY MORTGAGE—temporary sale with possession as security for debt—suit for sale—application of principals of Transfer of Property Act—Transfer of Property Act, ss. 58, 67, 68.	
A and B borrowed a sum of money from C, and as security sold	

certain land temporarily to C, whom they put in possession but who rented the land to them.

In a subsequent year they entered on and cultivated the land without C's consent, whereupon C sued them for ejectment and possession, with damages, or in the alternative for a decree for the amount of the loan with damages and for sale of the land in default of payment.

*Held*,—that the original transaction came within the definition of usufructuary mortgage in section 58 (d) of the Transfer of Property Act; that though the Act was not in force its provision might well be considered; and that, following the provisions of section 67, C was not entitled to a decree for sale. A decree was given for the ejectment of A and B, for putting C in possession, and for the payment of damages.

*Unda v. Umrao Begam*, (1888) I.L.R. 11 All., 367; *Luchmeshwar Singh v. Dookh Mochan Jha*, (1897) I.L.R. 24 Cal., 677; *Chaitu v. Kunjan*, (1888) I.L.R. 12 Mad., 109; referred to.

*Shwe Lok v. Ma Seik Kaung* ... .. 222

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VALIDITY OF GIFT OF UNDIVIDED SHARES IN FREEHOLD PROPERTY AND SHARES IN COMPANIES—*See* MAHOMEDAN LAW ... .. 154

VALIDITY OF PROCEEDINGS—*encroachment—adverse possession—See* DECISION OF BOUNDARY OFFICER AS A BAR TO SUBSEQUENT CLAIM ... 153

VALUATION FOR COURT-FEE AND FOR JURISDICTION—*See* ADMINISTRATION SUIT ... .. 279

VALUATION OF SUIT. AMENDMENT OF—*court-fee—jurisdiction—appeal—Lower Burma Courts Act*, ss. 2 (h), 28 (1) (c)—*Suits Valuation Act*, s. 8.

A brought a suit for, *inter alia*, an account and valued the relief claimed at Rs. 600. Against the decree passed in the suit she appealed to the Chief Court, valuing the appeal at Rs. 600, for computation of court-fee and at Rs. 13,860 for purposes of jurisdiction. At the hearing she asked to be allowed to put on an extra stamp so that the stamps on the memorandum of appeal should cover a claim for Rs. 13,800.

*Held*—that amendment of the valuation could not be allowed. The appeal was returned for presentation to the Divisional Court, in accordance with the original valuation of the suit.

*Thein Yin v. Foucar Bros. & Co., Ltd.* ... .. 120

VALUE OF EVIDENCE—*proof—Evidence Act*, 1872, ss. 155, 157—*See* ADVOCATE ... .. 27

VALUE OF SUIT—*See* ADMINISTRATION SUIT ... .. 279

VALUE OF TREES—*market value—Land Acquisition Act*, 1894, s. 23.

The value of trees on the land acquired cannot be awarded separately and in addition to the market value of the land, but must be included in the amount at which the market value is assessed. The second head of section 23 of the Act refers only to crops or produce which have been grown between the date of declaration of the intention to acquire and the date of the collector's taking possession.

*Ma Gyi v. The Secretary of State for India in Council*, 3 L.B.R., 117, referred to.

*Shwe Gaung v. The Collector* ... .. 71

VILLAGE ACT, 1889, s. 9 (2)—*See* REFUSAL OR NEGLECT TO COMPLY WITH REQUISITION HEADMAN ... .. 150

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